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In The Supreme Court of the United States

KIMCO OF EVANSVILLE, INC.
N/K/A KCH ACQUISITION, INC.,
THE FRANKLIN LIFE INSURANCE COMPANY
AND
VANDERBURGH COUNTY, INDIANA,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari to the
Indiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Indiana Supreme Court invoked principles of law which govern inverse condemnation cases, and, contrary to settled federal law, applied those principles to Petitioner's case to set aside a $2,300,000 jury award for just compensation to Petitioner in a physical taking, partial condemnation case, wherein the jury followed the federal courts' settled law in granting the award. In doing so, did the Indiana Court's decision conflict with the holdings of the federal courts that are in effect for 113 years, which establish the proper measure of just compensation in partial condemnation cases; thus violating Petitioner's rights under the Fifth and Fourteenth Amendments of the Unites States Constitution?

Is the Indiana Supreme Court's decision a form of "judicial taking" or "judicial legislation" in overruling established federal courts' holdings by its categorizing a physical, partial condemnation case as an inverse condemnation case and further by defining Fifth Amendment's "just compensation" clause inconsistent with and contrary to federal courts' undeviating decisions that establish the proper measure of damages to be used in partial condemnation cases, and by suddenly and arbitrarily overturning established federal case law serving as precedents for over 100 years and by depriving Petitioner of trial by jury; thereby committing a violation of the Fifth and Seventh and Fourteenth Amendments to the United States Constitution?

Is the Indiana Supreme Court's decision substituting itself as the trier of the facts to overrule the jury verdict where Petitioner has a right to trial by jury under Indiana law and the Seventh Amendment of the United States Constitution and the case was tried before a jury as demanded by Petitioner, and the jury found in favor of Petitioner, a violation by the Indiana Court of the Seventh Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Petitioner

Kimco of Evansville, Inc. n/k/a
KCH Acquisition, Inc. is the sole Petitioner
and is not a publicly traded corporation.
Kimco Realty Corporation is the parent company of
Petitioner
and is a publicly traded corporation.

Respondent

State of Indiana

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PETITION FOR WRIT OF CERTIORARI

Kimco of Evansville, Inc. n/k/a KCH Acquisition, Inc. respectfully petitions for a writ of certiorari to review judgment of the Supreme Court of Indiana.

OPINIONS BELOW

The unpublished Order of Indiana Supreme Court, *State of Indiana v. Kimco of Evansville, Inc.*, entered May 13, 2009 is attached as Appendix A-1.

The Opinion of Indiana Supreme Court, *State of Indiana v. Kimco of Evansville, et.al.*, 902 N.E.2d 206, entered March 4, 2009, is attached as Appendix A-3.

The Opinion of Court of Appeals of Indiana, *State of Indiana v. Kimco of Evansville, Inc.* 881 N.E.2d 987, entered October 31, 2007 is attached as Appendix A-26.

JURISDICTION

This Court has jurisdiction to review the Opinion of Indiana Supreme Court on a Petition for Writ of Certiorari pursuant to 28 U.S.C. Section 1257. The Indiana Supreme Court's Order denying Petitioner's Motion for Rehearing was entered May 13, 2009. This Petitioner's Motion for Writ of Certiorari is timely filed within 90 days from that date. Sup.Ct.R.13.

This case presents "an important question of federal law that has not been, but should be, settled by this Court". See Sup.Ct.R.10(c).

A second basis for certiorari review under Supreme Court Rule 10 is that there is a conflict among states which interpret their Constitutions differently as to the meaning of "just compensation" than Indiana Supreme Court interprets "just compensation", consistent with federal courts' decisions; whereas the Indiana Court's decision is inconsistent with federal courts' decisions and conflicts with federal courts' decisions of the meaning of "just compensation", as it relates to the right of a property owner to severance damages to the remaining property arising in partial condemnation, impairment of access cases in direct physical takings; and a further basis for jurisdiction in that the Indiana Court committed a "judicial taking" or "judicial legislation" by overruling established federal law on that subject.

A third basis for certiorari review is that the Indiana Court by substituting itself as finder of the facts and overruling a jury verdict in favor of Petitioner violates the Petitioner's right to a jury trial under the Seventh Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment of the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no

> fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

The Fourteenth Amendment of the United States Constitution provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves partial condemnation of Petitioner's shopping center resulting in impairment of ingress/egress access of the shopping center. The decision of the Supreme Court of Indiana entirely depriving Petitioner of a jury award for severance damages conflicts with settled law of federal cases as to Petitioner's right to severance damages.

Kimco owns Plaza East Shopping Center ("Plaza East") in Evansville, Indiana, at the intersection of Lloyd Expressway (runs east-west) and Green River Road (runs north-south). Plaza East has no ingress or egress along Lloyd Expressway. At the intersection, Lloyd Expressway is elevated above ground. Drivers exit Lloyd Expressway before reaching Green River Road via a service road. Plaza East has two entrances on Green River Road. Both are in existence after the taking. (See drawing of the property, before and after the taking, App. A-47)

Before the taking, Plaza East's main entrance was the southern entrance on Green River Road ("Southern Entrance"), allowing access to the *center* of Plaza East's parking lot. It is three lanes. Before installation of a median on the center of Green River Road by the State, shoppers could enter from, and exit to, both directions (north or south) on Green River Road. The Southern Entrance was controlled by a traffic light, which the State eliminated when the State constructed the median.

Plaza East's secondary entrance is the northern entrance on Green River Road ("Northern Entrance") immediately next to the sidewalk in front of a line of retail stores. This Northern Entrance is only two lanes; narrower than the Southern Entrance. This two lane feature which cannot be made into three lanes because of the State's appropriation is one of the most significant damaging facts of this case. Before the taking, the Northern Entrance allowed only "right-in/right-out" access for travelers going north to enter the shopping center, or when exiting to go northbound on Green River Road. There was a concrete island at the Northern Entrance. It separated incoming and exiting traffic. After the taking, the State's design changed that. The State allowed left turns in and left turns out, in addition to right in/right out, at this two-lane Northern Entrance, and further, as part of the State's design to make the Northern Entrance the shopping center's new main entrance, the concrete island at the Northern Entrance was removed by the State. This new design clogs up and severely impairs Plaza East's access. That fact was not controverted by State's evidence at the trial.

Before the taking, the Southern Entrance permitted vehicles to exit the shopping center in either direction (north or south) controlled by a traffic light. This was changed by the State building the median on Green River Road to extend up to and to end just before the Northern Entrance. Thus, after the taking, left turns out from that Northern

Entrance were permitted for exiting vehicles to go south on Green River Road and to permit left turns in for entering vehicles from southbound traffic on Green River Road. This was the State's design to make the Northern Entrance a substitute main entrance in place of the Southern Entrance for the purpose of mitigating the damage award.

Because of volume of speeding traffic on Green River Road and because the Northern Entrance is only two lanes, the Northern Entrance became congested and dysfunctional and exiting vehicles became "stacked" immediately in front of the stores, causing long waits, making it difficult for pedestrians to navigate the parking lot, and difficult and unsafe for shoppers attempting to enter or depart, and requiring changes be made by Petitioner to traffic and parking patterns and roadways inside the shopping center.

At trial, Petitioner's traffic expert provided lengthy and detailed testimony based on nationally recognized testing methods and personal observations (not contested or contradicted by the State) that the Northern Entrance being located in front of a line of retail stores and, most importantly, being only two lanes, it is not safe, suitable or adequate to function as an in/out access from or to four directions. Presenting it as a new 4-way entrance after the taking allegedly to replace the 3-lane former main entrance (that is, the Southern Entrance) actually disabled its use. It became dangerous, caused stacking on the roadway in the

shopping center lane adjacent to and in front of the row of retail stores, and caused unacceptable delays for drivers trying to leave, among other detriments. Drivers entering north and south, and drivers attempting to leave and turn south, all needed to use the one and only lane for that purpose.

All the foregoing, among other consequences of the State's design and construction, constitutes influences and factors in appraising the depreciation in value of the remaining shopping center after the taking, bearing on Petitioner's right to severance damages as part of "just compensation" in this partial condemnation case, as consistently so held by federal courts.

On June 23, 2000, the State filed a complaint to appropriate land from Plaza East's frontage along Green River Road to use the appropriated land as an acceleration/merge lane for drivers coming off Lloyd Expressway and turning right to go north on Green River Road, as part of its road construction project.

The State also appropriated an additional .048 acres of Plaza East's land for construction easements to park vehicles, equipment and materials, encompassing both the Southern and Northern Entrances of Plaza East, which lasted 4-1/2 years.

Most significantly, the State permanently froze all ingress and egress associated with Plaza East along Green River Road, therefore, permanently preventing any change to the Northern

and Southern Entrances by (in the State's complaint's language) effecting "permanent extinguishment of all rights and easements of ingress and egress to and from Green River Road". By this appropriation, the State precluded widening of both Entrances. Taking away Petitioner's right to widen the Northern Entrance making it nonfunctional is especially a crucial fact of this case.

When construction was completed in 2004, shoppers traveling southbound on Green River Road could only enter Plaza East through the Northern Entrance. The State constructed the median in the center of Green River Road to extend almost the entire length of Petitioner's shopping center fronting on Green River Road, but the median ended just before reaching the Northern Entrance. Shoppers traveling northbound on Green River Road could enter Plaza East via its Southern Entrance, but only by crossing a solid white line which the State painted in the road to separate the new acceleration/merge lane (built on Petitioner's property which the State appropriated for that purpose) and to demark it from the travel lanes going north. Shoppers intending to enter Plaza East could enter (right turn) into the Northern Entrance from the new acceleration/merge lane where they meet up with the new troubles by needing to enter one lane used for both in-coming and out-going vehicles.

After completion of the project, not only did tenant occupancy decline by 40%, but existing

tenants renegotiated existing leases. One store tenant (for example) renegotiated its lease rent for approximately $90,000 per year rent; compared to the previous $150,000 per year rent. The State did not contest that evidence.

Before the taking by the State, Plaza East was considered a Class B community shopping center, worth $7,300,000. After the taking, Plaza East's highest and best use was depreciated to a Class C Shopping Center having a value of approximately $5,000,000, according to the testimony of Petitioner's appraiser. The State's appraiser came close to that figure also.

It is common knowledge, and Petitioner's both factual and expert testimony at the trial, bore out that convenient and safe entry and exits from shopping center parking lots is an essential element to its value, second only to the site location of the property itself, if not in fact equal in importance.

These factors and influences may or may not be property rights, but are important considerations in appraising the after-taking decline in value of the remaining shopping center, as severance damages, as part of "just compensation" under the Fifth Amendment to the United States Constitution as per the holdings of the federal courts for over 100 years. This is one of the unconstitutional characteristics of the Indiana Supreme Court's decision: in that it violated the Fifth Amendment by conflicting with the federal courts' decisions in that the Indiana

Court denied Petitioner as a matter of law the right to severance damages.

Petitioner's brief submitted on its motion for rehearing to the Indiana Supreme Court after that Court's adverse decision reversing a unanimous decision of the Court of Appeals of Indiana in favor of Petitioner raised objection to the decision on the ground of violation of the United States Constitution.

SUMMARY OF ARGUMENT

The State took a portion of Petitioner's land from Petitioner's shopping center and designed and constructed changes to the roadway and took away (by its own words) Petitioner's access and easement rights, all of which directly, adversely affected the fair market value of the remainder of Petitioner's shopping center following the taking, and the Supreme Court of Indiana employed a measure of damages contrary to the Fifth Amendment and contrary to the "undeviatingly followed" decisions of federal courts (the quoted phrase is the court's phrase in United States v. Grizzard, 219 U.S. 180), including the United States Supreme Court interpreting the Fifth Amendment to require as measurement of "just compensation" severance damages to the remaining property after the taking.

The Indiana Court additionally deprived Petitioner of its right in this case to have the issue of "just compensation" decided by a jury which is in

violation of the Seventh Amendment of the United States Constitution.

A number of the issues raised in this Petition have never been formally addressed by this Court, although occasional language on those issues by this Court dealt with them, and this Court has applied an approach to those issues in a variety of other contexts. Other issues, such as the proper measure of determining damages in partial condemnation cases have been settled law in federal courts for 113 years, which the Indiana Supreme Court purports to overrule. This Court should address all these issues.

REASONS FOR GRANTING THE WRIT

On important questions of condemnation law and procedure, the Indiana Supreme Court issued a decision that is in conflict with the Fifth Amendment, the Seventh Amendment and the Fourteenth Amendment and in conflict with federal law decisions.

I. WHETHER A STATE COURT CAN ISSUE A DECISION THAT CREATES A DIFFERENT, MORE DETRIMENTAL MEASURE OF JUST COMPENSATION TO AN OWNER IN A PARTIAL CONDEMNATION CASE THAN THE MEASURE FEDERAL COURTS APPLY PURSUANT TO THE FIFTH AMENDMENT.

This is a Compelling Case For Granting Writ of Certiorari

This case presents compelling reasons to grant a writ of certiorari. The Indiana Supreme Court's opinion states: "We have held that the state and federal takings clauses are textually indistinguishable and are to be analyzed identically." *Kimco v. State of Indiana*, 902 N.E.2d at 210,211,212. Then, the opinion goes on to cite United States Supreme Court regulatory takings or inverse condemnation cases as controlling Petitioner's partial condemnation case, namely,

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538-40, 125 S.Ct. 2074 (2005); *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104,124,98 S.Ct. 2646 (1978). This analogy is unwarranted and contrary to federal cases. *Bauman v. Ross, 167* U.S. 568, 17 S. Ct. 966, 42 L. Ed. 270 (1897). *United States v. Grizzard,* 219 U.S. 180, 31 S. Ct. 162, 55 L. Ed. 165 (1910). If the Indiana Supreme Court decision is not overruled, that concept will stand as a beacon to all states, counties and cities, nationwide, to treat every actual taking, partial condemnation case which involves impairment of ingress/egress access and entails severance damages to be an inverse condemnation or regulatory taking case.

Therefore, unless and until the United States Supreme Court makes a pronouncement on the issues presented by this case, namely, that state courts must hew to the federal courts' decisions as to what "just compensation" means in the Fifth Amendment when applied to partial condemnation cases involving impairment of access suffered by the remaining property, the Indiana Supreme Court's interpretation of the "just compensation" clause of the Fifth Amendment of the United States Constitution will continue in the forefront. In the meanwhile, in addition to injustices piling up, future cases in which state courts utilize such concept will likely produce multitudes of litigation and appellate reviews.

Petitioner asserts the Indiana Supreme Court erroneously relied on an improper rule of law

conflicting with federal cases by which it erased a $2,300,000 jury award of just compensation to Petitioner. This contravenes the Fifth and Fourteenth Amendments. Petitioner asserts the error is not that the Indiana Court misapplied a properly stated rule of law (see Sup.Ct.R.10.), but instead applied an improper law, unconstitutional law and conflicts with law of federal courts' cases established over 100 years ago, thereby violating the Fifth and Fourteenth Amendments.

The Damages Included in "Just Compensation" Required by the Fifth and Fourteenth Amendments as Declared by Federal Courts That the Indiana Court Overruled

The Fifth Amendment requiring just compensation to be paid for taking of private property, and the Fourteenth Amendment applying the Fifth Amendment protections to citizens of each state, includes severance damages due to harm related to the appropriation of a portion of an owner's property when the case, as here, is a partial condemnation case. *United States v. Miller*, 317 U.S. 369, 376, 69 S. Ct. 276, 281, 87 L. Ed. 336 (1943); *United States v. Grizzard,* 219 U.S. 180, 31 S. Ct. 162, 163, 5 L. Ed. 165 (1911). Especially so in a case where the property appropriated is used by the State for a purpose that directly, particularly and uniquely causes harm to the owner's remaining property.

In this case, the State's taking Plaza East's land abutting Green River Road for use as the

acceleration/merge lane, bordered on one side by a solid white line painted thereon and running immediately past adjacent Southern Entrance, and the appropriation of all Petitioner's rights to widen the redesigned use of the Northern Entrance, thereby precluding Petitioner's ability to ameliorate the impairment to its access ingress/egress by adding a third lane; all the foregoing is related to the consequential harm impacted on Plaza East's remaining property, thereby directly causing the after-taking value of this remaining retail shopping center to be diminished. As held by federal courts, "just compensation" mandates payment by the State for severance damages to the remainder.

The Indiana Court's Conflict With Federal Cases

The Indiana Supreme Court entirely dismissed any severance damages, calling such damages irrelevant, because the Court defines it as "traffic flow", stating Petitioner has no protection or rights with regard to traffic flow. This arbitrary collectivism reasoning the Indiana Court employed to circumvent, by invented analysis, Petitioner's severance damages. The federal cases reject this sort of rationalization. *Hughes v. Washington*, 339 U.S. 290(1967).

The proper measure of damage to Plaza East, as in all partial condemnation cases, undeviatingly followed and declared by the federal courts, is the difference in market value before the taking

compared to the market value after the taking. *United States v. Grizzard,* 219 U.S. 180, 31 S. Ct. 162, 163, 5 L. Ed. 165, 31 L.R.A. (N.S.) 1135 (1911); *United States v. Chicago, B.&Q.R.Co.*, 90 F.2d 161. (Ct. of App., Seventh Circuit 1937). *United States v. 101.88 Acres of Land,* 616 F. 2d 762 at 767-768 (5th Cir. 1980). In appraising the after-taking value, all factors and all influences affecting the remaining property that a willing buyer would consider in arriving at a fair price must be taken into account.

These factors and influences are not necessarily "property rights", which the Indiana Supreme Court's decision made such an allegedly pivotal concept in its analysis. Whether they are property rights or not is not relevant. The Indiana Court in order to rationalize its vacating entirely the $2,300,000 jury verdict denotes those factors and influences as not property rights; and not being property cannot be condemned; and in that manner denies severance damages by saying nothing was owing for their injurious effects on the value of the remaining property. However, the federal mandated measurement of partial condemnation "just compensation" views those factors and influences as some of many factors bearing on determining after-taking value, whether they are property rights or not, and may be considered in determining after-taking value. *United States v. Olson,* 292 U.S. 246 (1934); *United States v. 158.24 Acres of Land,* 515 F. 2d 230 (5th Cir. 1975); *United States v. 33.5 Acres of Land,* 789 F. 2d 1396, 1398 (9th Cir. 1986).

They are influences and factors affecting the remainder of the property, and necessarily include, among other possible things: difficulty of ingress and egress; the effect of the state's design of the project; the construction of an acceleration/merge lane running adjacent to the property and past the Southern Entrance immediately up to the Northern Entrance; inability (due to State's taking property's rights of easements and access) of Petitioner ever to widen the Northern Entrance; rendering virtually non-functional the service of the Northern Entrance; the stacking of lines of cars in front of the row of retail shops; necessity of redesigning the interior traffic patterns of the shopping center to deal with the stacking and the difficulty and danger in entering or leaving by the Northern Entrance.

In allowing realistic influences to be considered, to determine impaired value of the remaining property, as a further example how inclusive is the list, the federal courts have explained that proof may be shown of adverse effects on the potential future uses to which the remaining property reasonably could have been put, since potential use affects market value. *United States v. Olson,* 292 U.S. 246, 245, 54 S. Ct. 704, 78 L. Ed. 1236 (1934).

Add to the foregoing the 4-1/2 years of State's construction equipment being stored on the shopping center, and the use of the Entrances by State vehicles and equipment in the construction project, as influences and factors affecting the value of the

remaining property in the eyes of a prospective buyer.

These are influences and factors that a buyer or an appraiser will consider in arriving at a purchase price or a market value, for the property following the taking. These are the factors and influences federal courts declare are part of severance damages. See, *United States v. Buhler*, 305 F. 2d 319 (5th Cir. 1962) in which the property owner did not meet the burden of proving that the influences and factors would diminish the market value of the remaining property, but the Court concedes they are relevant and could be considered as affecting the market value of the remainder if in fact it were so. The case contains a good discussion on the subject. In the *Buhler* case, a partial condemnation case, the influences and factors bearing on market value contended for was airport noise and operations. How much more significant is loss of access, which the Indiana Court in this case completely dismisses, compared to airport noise, which the *Buhler* court said can be considered.

All these factors and influences were testified to by Petitioner's witnesses at the trial and not denied by the State. Indeed, the Indiana Supreme Court recites them in its Opinion. The Court relegated these influences and factors into a category it calls collectively "traffic flow", and employs that reasoning to enable itself to deny damages to Petitioner, because no right has been taken from Petitioner; and the court follows that by applying an

analysis of federal inverse condemnation cases, asserting the principles of inverse condemnation to be applicable to those critical factors and influences just mentioned above, all contrary to holdings of the federal courts. (App. A-11)

"Just compensation" must mean the same for all citizens. Each state cannot be permitted to adopt its own definition when it contravenes the Fifth Amendment. Federal courts apply the method required by the Fifth Amendment, the "before and after" market value taking method, to calculate just compensation. That method is binding on the states through the force of the Fourteenth Amendment.

The United States Constitution Rules Apply, Not the State's rules, as to Measurement of "Just Compensation"

Surely, this Court cannot permit states to invent more draconian method of calculating just compensation against a citizen than the federal courts allow by interpreting the Fifth Amendment's meaning of and method of measurement of "just compensation". There must be one rule for all.

Generally, as to many rules used by the states with regard to condemnation cases, the states' local rules are followed by the federal courts. However, these relate to procedure. They do not, and could not, affect questions of substantive right, such as the measure of compensation, grounded upon the Constitution of the United States. The foregoing

words were words as spoken by the Supreme Court of the United States in *United States v. Miller,* 317 U.S. 369, 63 S. Ct. 276 at page 283, citing *Brown v. United States,* 263 U.S. 78, 86, 44 S. Ct. 92, 95, 68 L. Ed. 171 and *Chappell v. United States,* 160 U.S. 499, 512, 513, 16 S. Ct. 397, 401, 49 L. Ed. 510.

The "Before-and-After" Rule Consistently Declared by the Federal Courts is the Measure of "Just Compensation to be Used in Partial Condemnation Cases Which the Indiana Court Denied

As early as the nineteenth century, the United States Supreme Court made clear that just compensation in partial taking cases must include compensation for loss in value to any property not taken. In *Bauman v. Ross*, 167 US 548,574 (1897) it stated, "when the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account." Over the years, this has come to be known as the "before-and-after" rule, requiring that the property's market value before the taking be compared with its market value afterward; and if the value be less, the difference serves as the amount of just compensation. Fair market value is found by evaluating all the factors and possibilities that would affect the price a willing buyer would offer to a willing seller for the property.

In *United States v. Grizzard*, 219 U.S. at page 185, 31 S. Ct. at page 164, the court declared that:

to say an owner would be compensated by paying him only for the narrow strip actually appropriated, and leaving out of consideration the depreciation to the remaining land by the manner in which the part was taken, and the use to which it was put, would be a travesty upon justice. See also, *West Virginia Pulp & Paper Company v. United States,* 200 F. 2d 100 (4th Cir. 1952); *United States v. Pope & Talbot, Inc.,* 293 F. 2d 822 (9th Cir. 1961); *United States v. 91.90 Acres of Land,* 586 F. 2d 79, 3 Fed. Evid. Serv. 1249 (8th Cir. 1978).

There is No Relationship Between Liability in Inverse Condemnation Cases and the Measure of Damages Which Federal Courts Have Declared Applicable in Partial Condemnation Cases, as Proposed by the Indiana Court

The State, in an attempt to erase the jury's just compensation award to Petitioner, argues that consequential damages are "damnum absque injuria", and therefore need not be taken into account to be included in just compensation awards when damages are such as the effects of roadway design and construction. The Indiana Supreme Court endorsed that argument by holding that adverse factors and influences consisting in what the Court denotes with arbitrary collectivism as "traffic flow" in partial condemnations are not property rights for which the State need compensate Petitioner, because the very high threshold of proof of damages to the remaining property applicable to inverse condemnation (virtual destruction of the

entire economic value of the property) is not proved. The Indiana Court decision applies inverse condemnation principles to this case.

This proposition is invalid because it confuses a rule of *liability* in inverse condemnation cases with a principle of *just compensation* in direct condemnation cases. It is critical to recognize the distinction. Inverse condemnation cases allege that some governmental activity has resulted in a taking of property. There is not physical taking, as in partial condemnation. The causes in inverse cases are more remote. For the government to be liable for a taking in an inverse condemnation case, the property owner must initiate the legal action and must show that the government activity has damaged the property to such a degree that the property's economic value has effectively been destroyed. *Lingle,,* 544 U.S. 528 (2005). Only when that *liability* is established by the owner does the owner have a right to compensation. This is the test the Indiana Court holding thrusts on Petitioner, and the Indiana Court holds that only meeting that burden would sustain the $2,300,000 jury verdict in this partial condemnation case.

In direct condemnation, there is no question the condemning agency takes land. In that instance, *liability* is admitted. The only issue is compensation, which constitutionally must place the property owner in as good a position as it would have been in had the taking never occurred. *Kemp v. United States,* 65 Fed. Cl. 818 (Fed. Cl. 2005). These

differences between the rules of *liability* in inverse condemnation cases and the rules of *compensation* in direct condemnation cases are recognized by the federal courts. This difference is recited in a leading condemnation treatise, stating that the most important limitation on this concept turns upon whether the damage claim is an element of a "severance damage" case in the severance damage context; and that any diminution in value to the remainder parcel is compensable if it is attributable to the taking. *Nichols on Eminent Domain,* Section 6.08(2) (rev.ed.1993).

As found by the jury, the damage to Plaza East is specific, unique, particular and direct, not shared in common by the public at large; and the land and property interests which the State physically took and appropriated is used by the State in manner causing harm to the Plaza East remaining property. Any attempt to employ an analogy to inverse condemnation conflicts with the established meaning of constitutional "just compensation" that requires property owners to be compensated for the adverse difference in a property's value before and after the taking, and runs headlong collision into the requirement that just compensation must take into account all factors and influences relevant to market value.

II. THE INDIANA SUPREME COURT DECISION CONSTITUTES AN INSTANCE OF "JUDICIAL TAKING" OR "JUDICIAL LEGISLATION" BY IMPOSING A DIFFERENT

AND MORE ONEROUS OR LIMITED CALCULATION OF "JUST COMPENSATION" CONFLICTING WITH ESTABLISHED FEDERAL LAW AND TO FURTHER ITS "JUDICIAL TAKING" NULLIFIES THE JURY VERDICT TO MAKE ITSELF THE SOLE TRIER OF THE FACTS.

The Flaws in the Indiana Supreme Court's Opinion That Conflict With Federal Cases

The concept pronounced by the majority of the Indiana Supreme Court to justify its decision is the flow of traffic. This "traffic flow" shibboleth is employed to categorize this case as an inverse condemnation case.

Petitioner submits that traffic flow is clearly different and distinguishable from impact on the ingress and egress to one's property. Road improvements may in some cases improve the value of a remaining shopping center by promoting speedier reachability to it by distant shoppers, and so, the word "access" in a broad sense could mean the ability to arrive at or travel to the property via the roads. That kind of access is not the focus in this case. In the context of Petitioner's claim, a different focus is applicable. The meaning of access is: having arrived at the shopping center, are customers and other visitors safely and conveniently able to get in through the entranceways? And once in, can they depart safely and conveniently? The fact that they are there, as stressed by the Indiana Supreme Court,

is not a real-life view of this case. The question is, are the entry points usable and functionable? That is the significant fact of access that a willing buyer would weigh as directly bearing on the price he would pay for the remaining property.

The Indiana Court ignores all the State's injurious design and construction by its taking land to use for an acceleration/merge lane, and taking of access and easements rights of Petitioner, and conceptually wrapping it within its concept of traffic flow, declaring as a matter of law that Petitioner's proof does not prove virtual destruction of all value, which is the proof necessary in an inverse condemnation case, thus immunizing the State from responsibility to pay any amount of just compensation to Petitioner severance damages. The decision by the majority Indiana Court nullifies the jury verdict, which found after-taking decline in value of the remainder. This is a violation of Petitioner's Fifth and Seventh and Fourteenth Amendment rights.

Moreover, the Indiana Court substitutes itself as the finder of facts, and deprives Petitioner of its right to a jury after Petitioner demanded a jury trial to be the fact-finder and the case was tried before a jury. This usurpation by the Indiana Court in itself violates Petitioner's constitutional right and contradicts declarations opposing such practice by federal courts. See *City of Monterrey v. Del Monte Dunes Monterrey Ltd.,* 526 U.S. 687, 691 (1991), Justice Scalia's concurring opinion; *United States v.*

Reynolds, 397 U.S. 14, 16 (1970) in which the federal court stated there is no right to trial by jury in condemnation cases, but if allowed and demanded, the jury should find the facts.

Allowing the Indiana Court's decision to stand, if not overruled by the United States Supreme Court with all its constitutional flaws, will constitute to the nation, and to every state, city and county, a signal to follow its lead. Every median or roadway case, even those involving actual takings as in this case, as a matter of law, per se, becomes a traffic flow inverse condemnation case in the concept of the Indiana Supreme Court. Every road improvement case would ignore as a matter of law any evidence of State actions affecting ingress or egress of one's property, because it is labeled as a traffic flow case, contradicting the federal cases that require severance damages.

This is Not a Regulatory Taking Case and Not an Inverse Condemnation Case, as Held by the Indiana Supreme Court in Conflict with Federal Law

The Indiana Supreme Court creates a dichotomy between compensation for Petitioner's land taken and separately isolates the adverse impact the State's design and construction of the road improvements imposes on the remainder of the shopping center in order to erase Petitioner's severance damage.

The United States Court of Appeals, in *United States v. 91.90 Acres of Land*, 586 F.2d 79,86 (8th Cir. 1978) expressed the settled law of an owner's entitlement to severance damage appertaining to partial takings cases. The Circuit Court states that where the government condemns only a part of a single holding, just compensation is to be measured by the difference between the fair and reasonable market value of the entire ownership immediately before the taking and the fair and reasonable market value of the remaining portion immediately after the partial taking, and that where the partial taking not only deprives the owner of the property actually taken, but also diminishes the value of the property remaining to the owner, this diminution is often called "severance damages".

In this case, the trial court denied State's motion to set aside the $2,300,000 verdict. The Indiana Appeals Court unanimously affirmed the verdict. On appeal to Indiana Supreme Court, three judges, with two dissenters, reversed. The majority's theory is that the road improvements should be separated from the taking, relegating the case to an inverse condemnation case. This is not the test required by the Fifth Amendment as decided by the federal courts.

It should be particularly noted that the proposition that the federal law requiring that severance damages is applicable is reinforced when the part of the tract taken by the State is a direct cause of the impairment of an entranceway to the

center (as acceleration/merge lane), and when the State's redesign of the traffic turning movements at the Northern Entrance forces the Plaza East's Northern Entrance, although inadequate for the purpose, to serve as the substituted, new main entrance to the shopping center, creating insufferable congestion and unsafe conditions.

As the severance damage is the method federal courts use in the partial condemnation cases, surely, United States Supreme Court should not allow a different, more severe – even to say, draconian – measure of just compensation to be applied by the states. The Fourteenth Amendment, in conjunction with the Fifth Amendment, prohibits such an unequal result.

The United States Supreme Court has the opportunity in this case to make a declaration applicable to all the states, confirming and establishing a minimum national standard that will constitute and satisfy the "just compensation" mandated by the Fifth Amendment that applies to partial condemnation cases.

Petitioner submits that the Fifth Amendment to the Constitution cannot be interpreted to permit each state to invent its own measure and method of calculating "just compensation" if it conflicts with the Fifth Amendment as interpreted by the federal courts; one state saying it is one thing and another state saying it is something different and each violating the Fifth Amendment in its own way; one

state inventing its own measure, different from the federal constitution, employing self-conceived or self-preferred reasons to deny just compensation awards, which violate the established federal standard. *United States v. Miller,* 317 U.S. 369 (1943).

Petitioner submits that the Indiana Supreme Court's decision, for the reasons set forth in this Petition, is unconstitutional and violates Petitioner's rights under the Fifth and Seventh and Fourteenth Amendments of the United States Constitution.

The Indiana Supreme Court's Opinion Raises an Important Question of Federal Law That Has Not Been Settled by This Court

A. Several Justices of This Court Have Opined on the Issue of Judicial Takings in Concurring Opinions and Dissents

The most obvious prohibited takings occurs when a government appropriates or invades private property. *Kelo v. City of New London Conn.,* 545 U.S. 469 (2005); *Loretto v. Telepromter Manhattan CATV Corp.,* 458 U.S. 419 (1982), or when it regulates property to the extent it takes for constitutional purposes. *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 525, 538-541 (2006).

These takings of property most often arise from legislative or administrative acts. The question remains whether decisions of state courts, such as the action of the Indiana Court in this case, can give

rise to similar government liability, called the doctrine of "judicial takings". This has been asked of the United States Supreme Court before. This Court denied a petition for writ of certiorari filed by the owners of beachfront property in Oregon, *Stevens v. City of Cannon Beach,* 510 U.S. 1207, 114 S. Ct. 1332 (1994). There *Stevens* alleged the Oregon Supreme Court's application of the doctrine of customary use effected a taking of private property, without "just compensation", in violation of the Fifth and Fourteenth Amendments.

Justice Scalia, joined by Justice O'Connor, dissented, referring to this Court's opinion in *Lucas*, 505 U.S. 1008, that certain principles inherent in the right to security in private property are so fundamental as to require payment when they are abrogated by state action. *Stevens,* 114 S. Ct. at 1334 (Scalia, J., dissenting). Justice Scalia stated, "No more by judicial decree than by legislative fiat may a State transform private property into public property without just compensation." *Id.*

There are opinions of this Court that reflect Justice Scalia's view of the validity of the judicial takings doctrine. Justice Stewart's concurrence in *Hughes v. Washington,* 389 U.S. 290, 296-97 (1967) (Steward, J., concurring) is a good example.

B. In Several Contexts, This Court Has Recognized State Court Departures From Established Law Can Violate Fundamental Rights

In another case, for example, *Webb's Fabulous Pharmacies v. Beckwith,* 449 U.S. 155 (1980), this Court considered a Florida Supreme Court decision which upheld as constitutional a state statute permitting counties to seize interest accruing on an interpleader fund paid by private citizens and maintained by county courts. *Id.* At 155-56. This Court's opinion focused not as much on the Florida statute, as on the Florida Supreme Court's opinion interpreting that statute, finding the Florida court's holding unconstitutional, and that "[n]either the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principle as "public money" because it is held temporarily by the court." *Id.* At 164. This Court concluded with a statement precisely on point for the present case: "a State, by *ipse dixit,* may not transform private property into public property without compensation..." *Id.* So, in Petitioner's case, the Indiana Court cannot by *ipse dixit* transform all the adverse factors and harmful influences bearing on fair market value of Petitioner's remaining shopping center into ignorable, immunizing "traffic flow".

Similarly, in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court confronted a state court decision that departed significantly from established jurisprudence governing a basic right. The South Carolina Supreme Court applied an entirely new construction of a criminal trespass statute to uphold

the convictions of two trespassers. *Id.* At 362. This interpretation was such a departure from settled law that this Court held it amounted to violation of the petitioners' due process rights, stating "If a state legislature is barred from passing such a law, it must follow that a State Supreme Court is barred by the due process clause of the United States Constitution from achieving precisely the same result by judicial construction." *Id.* At 353-54.

CONCLUSION

The State took a portion of Petitioner's land from Petitioner's shopping center and designed and constructed changes to the roadway and took away (by its own words) Petitioner's access and easement rights; all of which directly, adversely and uniquely affected the fair market value of the remainder of Petitioner's shopping center following the taking; and the Supreme Court of Indiana employed an analysis of measure of damages contrary to the Fifth Amendment of the United States Constitution and contrary to the "undeviatingly followed" decisions of federal courts including the United States Supreme Court. (The quoted phrase is from United States v. Grizzard, 219 U.S. 180.)

The Indiana Court additionally deprived Petitioner of its right in this case to have the issue of "just compensation" decided by a jury whose verdict the Indiana Supreme Court overrules by making itself the trier of the facts in violation of Petitioner's right to trial by jury under the Seventh Amendment of the United States Constitution.

The Petition for Writ of Certiorari should be granted.

DATED: August 6, 2009

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

KIMCO OF EVANSVILLE, INC.
N/K/A KCH ACQUISITION, INC.,
THE FRANKLIN LIFE INSURANCE COMPANY
AND
VANDERBURGH COUNTY, INDIANA,
Petitioners,

v.

STATE OF INDIANA,
Respondent.

On Petition for Writ of Certiorari to the
Indiana Supreme Court

APPENDIX

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Cause Number

ROBERT BODKIN

P.O. BOX 657
EVANSVILLE, IN 47704

Fax Number: 812-421-4936

82S01-0806-CV-00308
Lower Court Number:
82C010006CP315
Court of Appeals No:
82A010607CV00301

STATE OF INDIANA -V- KIMCO OF EVANSVILLE ET AL.

You are hereby notified that the SUPREME COURT has on this day 5/13/09

APPELLEE'S PETITION FOR REHEARING IS DENIED WITHOUT OPINION.

RANDALL T. SHEPARD, CHIEF JUSTICE
SHEPARD, C.J., SULLIVAN AND
BOEHM, JJ., CONCUR

DICKSON AND RUCKER, JJ., VOTE TO GRANT REHEARING. KJ

WITNESS my name and the seal of said Court, this 13th day of May, 2009

Kevin S. Smith
Clerk, Supreme Court of Appeals and Tax Court

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Filed: 3/4/09, 8:19 am

In the
Indiana Supreme Court

No. 82S01-0806-CV-308

STATE OF INDIANA,

Appellant (Plaintiff below),

v.

KIMCO OF EVANSVILLE, INC., N/K/A/KCH ACQUISITION, INC., THE FRANKLIN LIFE INSURANCE COMPANY, AND VANDERBURGH COUNTY, INDIANA

Appellees (Defendants below).

Appeal from the Vanderburgh Circuit Court,
No. 82C01-0006-CP-315
The Honorable Carl A. Heldt, Judge

On Petition to Transfer from the Indiana Court of Appeals, No. 82A01-0607-CV-301

March 4, 2009

Boehm, Justice.

In State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960), this Court held that roadway improvements that reduce or interfere with traffic flow to a commercial property do not constitute takings of a property right of the owner of the property. We reaffirm Ensley and hold that the shopping center owners are not entitled to consequential damages from street reconfigurations that affect traffic flow through the center and prevent expansion of existing points of ingress or egress, but leave existing points in place.

Facts and Procedural History

Kimco owns the Plaza East Shopping Center in Evansville. Plaza East is an open-air shopping complex bordered by Lloyd Expressway on the south and Green River Road on the west. As shown on the schematic diagram in Appendix A, retail stores are located on the north and east sides of a roughly square property, and a parking area occupies the area to the south and west. There are two main entrances/exits to the center, both on Green River Road.[1] The southern entrance has three lanes and

---

[1] Cars can also enter the complex from the east leg of Plaza East Boulevard, which borders the shopping center on the north and east. Because of limited visibility and access from major arteries, Plaza East Boulevard is not considered a principal entry to the mall. At one time Plaza East had entrances along its southern boundary. However, in a previous taking not at issue here, the State condemned the southern access points to construct part of the Lloyd Expressway, a limited access expressway. Kimco was compensated for that taking following a jury trial in 1989.

opens into Plaza East's parking lot. The northern entrance has two lanes and is situated near the northern strip of storefronts.

Before the construction at issue in this case, both northbound and southbound traffic on Green River Road could use the southern entrance to enter or exit the center. The northern entrance provided access for both north and southbound traffic, but permitted only northbound exits (right turns) due to a "no left turn" sign and a concrete divider in the entrance.[2]

In 2000, the State filed its Complaint seeking to acquire a 0.154-acre strip of land along the western border of Plaza East to widen Green River Road and improve traffic flow to and from Lloyd Expressway. The State also sought the "permanent extinguishment of all rights and easement of ingress and egress to, from and across" Green River Road along the length of the acquired property. As a practical matter this would preclude Plaza East from adding new entrances on Green River Road or widening its existing access points. The State also requested a temporary construction easement giving the State access to the center's parking lot for the duration of the project. In October 2000, the trial court issued an Order of Appropriation allowing the

---

[2] There are assertions in the record that only northbound traffic could access the northern entrance prior to the roadway reconstruction. But the photographs and other exhibits show that southbound traffic on Green River Road could access the northern entrance as well.

State to proceed with the condemnation. Kimco requested a jury trial on the issue of damages.[3]

In the ensuing four and one-half years, the State added and reconfigured the lanes on Green River Road, modified the Lloyd Expressway intersection, and installed a raised median in Green River Road that prevented southbound traffic from using the center's southern entrance for ingress or egress. The State created a merge lane on the eastern side of Green River Road for northbound traffic exiting from Lloyd Expressway, Northbound motorists on Green River Road now must use the merge lane, defined by a solid white line in the 0.154-acre strip, to access Plaza East's southern entrance. Finally, the northern entrance was changed to permit full ingress and egress by removing the concrete divider and allowing exiting traffic to turn left onto South Green River. The width of both the northern and southern entrances to Plaza East remained unchanged.

The case proceeded to trial in February 2006. During Kimco's case-in-chief, evidence of "loss of

---

[3] After the State filed its complaint, Kimco initially failed to enter an appearance in the case. The trial court subsequently issued its Order of Appropriation and instructed court-appointed appraisers to calculate damages. The appraisers assessed the State's taking at $95,300.00 and the trial court ordered the State to compensate Kimco accordingly. In May 2001, Kimco entered an appearance alleging that it had not received service of process and was unaware of the condemnation action. After the parties agreed to reinstate the litigation, Kimco filed exceptions to the court-sanctioned appraisal, and requested a jury trial on the issue of damages.

access" at Plaza East and its effect on the shopping complex included testimony that (1) the new median and merge lane restricted motorists' access to the mall's southern entrance; (2) the impaired access at the southern entrance, combined with allowing left turns at the northern drive, created unsafe congestion at the northern entrance near the Plaza East storefronts; (3) the road reconfigurations made the shopping complex undesirable to retail tenants; and (4) Plaza East's occupancy had dropped by nearly forty percent due to the access problems. Kimco's appraiser testified that Plaza East depreciated from a preconstruction value of $7,300,000 to roughly $5,000,000 due in large part to the access issues. He assessed the value of the property acquired by the State at $67,000 for the strip and $8,400 for the temporary construction easement, and assigned a value of $2,233,000 to the impaired access and any remaining "cost-to-cure," i.e., damage to the residual property.

The State unsuccessfully moved for judgment on the evidence at the close of Kimco's case on the ground that impaired access at Plaza east was not compensable. Following the close of the evidence, the State objected to the "submission of the issue of compensability of access rights to the jury" and reiterated its prior objection to the admission of loss-of-access evidence. The trial court, over objection of the State, instructed the jury as follows:

> In order for you to award damages for loss of access, Kimco must have suffered a particular, private injury resulting from a substantial and material interference with

> Kimco's rights of ingress and egress which are special and peculiar to this property and when no other reasonable means of access are available.
>
> You may not award damages for loss of access if the remaining access is merely more inconvenient or difficult, as long as it is reasonable.
>
> "Other reasonable means of access," as used in this instruction, does not mean access that is reasonable for some other use of the land. Rather, it refers to the access that will permit the land to be used for that purpose regarded as its highest and best use immediately before the taking.

The jury awarded Kimco $2,300,000.[4]

The State appealed, arguing that the trial court erred by admitting Kimco's loss-of-access evidence and by giving the quoted instructions. See State v. Kimco of Evansville, Inc., 881 N.E.2d 987 (Ind. Ct. App. 2007). The court of appeals affirmed, concluding that the sum of the State's roadway improvements created an injury to Plaza East that amounted to more than mere inconvenience, and

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[4] The trial court entered a total judgment in the amount of $3,196,859.82, reflecting the addition of $896,859.82 in prejudgment interest. See Ind. Code § 32-24-1-11(d)(6) (2004) ("In any trial of exceptions, the court or jury shall compute and allow interest at an annual rate of eight percent (8%) on the amount of a defendant's damages from the date plaintiff takes possession of the property.").

that Kimco suffered a taking of its access rights as a matter of law. Id at 995. The Court of appeals held that the trial court therefore properly admitted Kimco's loss-of-access evidence and that the court properly instructed the jury on the compensability of lost access. Id. We granted transfer.

There is no dispute in this case that the State's appropriation of the 0.154-acre strip and the temporary construction easement were compensable takings entitling Kimco to damages. These physical takings, apart from the roadway improvements, were valued at no more that $100,700.[5] Therefore, the jury award of $2.3 million is sustainable only if Plaza East's impaired access is compensable.

Standard of Review

The State challenges the jury verdict as excessive. In particular, the State appeals the admission of evidence relating to the median, merge lane, and traffic flow problems at Plaza East, and the loss-of-access instruction of the jury. These claims all turn on the State's contention that any effects on the access to Plaza East from the State's roadway improvements are not compensable as a matter of law. We therefore review under a de novo

---

[5] The State's appraiser testified that the value of the taking—consisting only of the appropriated strip of land, the temporary construction easement, and any cost-to-cure—was $58,000. The State's appraiser had assessed the taking at $100,700 in a previous report. The appraiser explained that his prior assessment was a limited appraisal done for purposes of negotiation.

standard. See Biddle v. BAA Indianapolis, LLC, 860 N.E.2d 570, 575 (Ind. 2007)

I. The Constitutional Background

Article I, section 21 of the Indiana Constitution provides that "No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." The Fifth Amendment of the U.S. Constitution similarly provides that "nor shall private property be taken for public use, without just compensation." The Fifth Amendment's Takings clause applies to the states via the Due Process Clause of the Fourteenth Amendment. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980); Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 241 (1897). We have held that the state and federal takings clauses are textually indistinguishable and are to be analyzed identically. Cheatham v. Pohle, 789 N.E.2d 467, 472-73 (Ind. 2003) (citing B & M Coal Corp. v. United Mine Workers of Am., 501 N.E.2d 401, 406 (Ind. 1986)).

There is no question that an exercise of eminent domain, such as the condemnation of the 0.154-acre strip in this case, is a constitutional "taking." Other forms of governmental action, however, are "takings" only if they meet the prevailing federal standard, which is that government action effects a taking if it deprives an owner of all or substantially all economic or productive use of his or her property. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538-40 (2005).

Factors considered under the foregoing test include the economic impact of the regulation on the property owner, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The effects of the road improvements on Plaza East, if viewed separately from the taking of the 0.154-acre strip, plainly do not meet the Lingle test. Presumably for this reason Kimco presents its case in terms of Indiana case law. Because recent constitutional takings cases to some extent have modified Indiana case law, a discussion of these constitutional cases is useful background.

In Biddle v. BAA Indianapolis, LLC, 860 N.E.2d 570 (Ind. 2007), we reviewed Indiana's eminent domain language and harmonized our takings analysis with the federal approach spelled out in Lingle and Penn Central. Biddle was a Fifth Amendment case analyzing the compensability of aircraft noise near residential properties. 860 N.E.2d at 572-73. In the course of distilling a takings framework to apply to the case, Biddle disapproved some earlier formulations of compensable actions either by eminent domain or some form of regulatory taking:[6]

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[6] Indiana courts, for example, have held that a taking in eminent domain includes "any substantial interference with private property which destroys or impairs one's free use and enjoyment of the property.": Bd. of Comm'rs v. Joeckel, 407 N.E.2d 274, 278-79 (Ind. Ct. App. 1980) (citing State v. Stefaniak, 250 Ind. 631, 637, 238 N.E.2d 451, 454 (1968)), and that to be compensable the injury must be :special and peculiar to the real estate and not some general inconvenience suffered alike by the public." Bussing v. Ind.

> Some of our own inverse condemnation cases have labeled the required degree of harm for takings a "special" or "peculiar" injury.... This requirement has two aspects to it. First, the injury must be different in kind from what the public experiences. Second, the injury must be of a degree that exceeds mere inconvenience.
>
> Neither of these seems to add much to the task of identifying takings. It merely states the obvious to observe that to have a plausible takings claim one must experience a burden not shared by the public generally. And one who suffers "mere inconvenience" likely possesses an extraordinarily weak takings claim.
>
> We think the Lingle analysis ... is a more precise standard for measuring the degree of harm, one that will result in more consistent decisions.

Id. at 580 (citations omitted). Biddle involved a federal constitutional claim and dealt with the specific issue of aircraft noise in residential communities. But importantly, we expressed our disapproval of Indiana's traditional takings language and explained that the federal approach was more effective and practical, and would produce more uniform results. We reaffirm the view expressed in Cheatham and Biddle that our state constitutional

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Dept. of Transp., 779 N.E.2d 98, 104 (Ind. Ct. App 2002) (citing Young v. State, 252 Ind 131, 134, 246 N.E.2d 377, 379 (1969); State v. Jordan, 247 Ind. 361, 368, 215 N.E.2d 32, 35 (1966)), trans.denied.

takings analysis is the same as federal constitutional eminent domain law, as interpreted by Lingle and Penn Central.

Constitutional doctrine is not the end of the matter. Legislatures may confer greater rights to compensation for government action than those afforded by the constitutional takings clauses. Kelo v. City of New London, 545 U.S. 469, 489 (2005). The legislature in Indiana has arguably done so as to takings by exercise of eminent domain. In particular, the eminent domain act provides for the following bases of compensation in eminent domain proceedings:

> (1) The fair market value of each parcel of property sought to be acquired and the value of each separate estate or interest in the property.
> (2) The fair market value of all improvements pertaining to the property, if any, on the portion of the property to be acquired.
> (3) The damages if any, to the residue of the property of the owner or owners caused by taking out the part sought to be acquired.
> (4) The other damages, if any, that will result to any persons from the construction of the improvements in the manner proposed by the plaintiff.

Ind. Code § 32-24-1-9(c) (2004). As we will see, some cases have looked to this statutory language as the source of compensable damage in an eminent domain context.

II. Medians, Traffic Flow, and State v. Ensley

Indiana law has specifically addressed the damages to adjacent landowners from reconfigured highways. Many of the principles applicable to this case come from this Court's opinion in State v. Ensley, 240 Ind. 472, 164 N.E.2d 342 (1960). In Ensley, the defendant property owners operated a recreational center in Indianapolis. 240 Ind. at 476, 480 164 N.E.2d at 344, 346. The property was bounded by Keystone Avenue on the east and 62nd Street on the north, with entrances on both streets. Id. at 476, 480-81, 164 N.E.2d at 344, 346. The Keystone entrance was approximately 65 to 68 feet wide and provided access to both northbound and southbound traffic on Keystone Avenue. Id. at 480, 164 N.E.2d at 346. The State condemned a strip of land along the property's eastern border to widen Keystone Avenue. Id. at 476, 164 N.E.2d at 343-44. The State also installed a raised median which prevented northbound traffic from making a left turn to enter from Keystone. Id. at 481, 164 N.E.2d at 346. Northbound motorists on Keystone were required to continue past the property, turn left on 62nd Street, and drive approximately one-half block to enter the property from the 62nd Street entrance. Id. Because of the raised divider strip and subsequent access restrictions, the recreational center's property value allegedly declined. Id. at 479, 164 N.E.2d at 345.

The Ensley Court held preliminarily that the median installation did not entitle the defendants to compensation under the Indiana Constitution. Id. at 482, 164 N.E.2d at 346. The Court explained that "acts done in the proper exercise of governmental powers and not directly encroaching on private property, although their consequences may impair its use or value, do not constitute a 'taking' within the purview of [Indiana Constitution article I, section 21]." Id. "Any injury so caused is deemed to be remote and inconsequential, and thus not compensable in the absence of an express statute to the contrary." Id. at 482, 164 N.E.2d at 346-47. Although not phrased in the Lingle language, the substance of this view anticipated a similar standard: any impaired value derived from some action that does not "encroach upon the property" is not compensable.

The property owners in Ensley argued that they were entitled to consequential damages from the median installation under a provision of the then-current eminent domain statute, which was substantially identical to subsection 9(c)(4) of the current version, and allowed compensation for damages "from the construction of the improvements in the manner proposed by the plaintiff." Burns Ind. Stat. Ann § 3-1706 (1946 repl.).[7] This Court disagreed, explaining that to

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[7] The statute provided for the following bases of compensation in eminent domain proceedings:

be compensable, damages "must result directly from the taking of some property right." 240 Ind. at 486, 164 N.E.2d at 348. The cited statute provides the measure of damages from a taking of a property right. It does not create a right to compensation where no taking has occurred. The Court held that the fact that access to Appellees' property from Keystone Avenue may have been rendered less convenient by the improved highway did not constitute a taking of a property right. Id. The court further explained that

> What appellees are actually contending here is that they have a property right in the free and unrestricted flow of traffic passing their premises and any impairment of, or interference with, this alleged right must be compensated. They here are attempting to

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> First. The fair market value of each parcel of property sought to be appropriated, and the value of each separate estate or interest therein;
>
> Second. The fair market value of all improvements pertaining to the realty, if any, on the portion of the real estate to be condemned;
>
> Third. The damages, if any, to the residue of the land of such owner or owners to be caused by taking out the part sought to be appropriated;
>
> Fourth. Such other damages, if any, as will result to any persons or corporation from the construction of the improvements in the manner proposed by the plaintiff.
>
> Burns Ind. Stat. Ann. § 3-1706 (1946 Repl.)

> equate this alleged "right" with the property right of ingress and egress. The general rule is that there is no property right of an abutting property owner in the free flow of traffic past his property and thus no compensation can be claimed if traffic is diverted from his premises or made to travel a more circuitous route.

Id. at 489, 164 N.E.2d at 350. The Court concluded that because the owners had "no property right in the free flow of traffic past their premises," the construction of the median did not deprive them of a property right and no compensable taking had occurred. Id. at 490, 164 N.E.2d at 350.

The principles announced in Ensley have since been applied and clarified in a series of eminent domain cases dealing with traffic flow issues and rights of ingress/egress.[8] Each of these

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[8]State v. Geiger & Peters, Inc., 245 Ind. 143, 150-51, 196 N.E.2d 740, 743 (1964) (finding a compensable taking where the State constructed a fence and embankment cutting appellees off from the highway); State v. Hastings, 246 Ind. 475, 479-83, 206 N.E.2d 874, 876-78 (1965) (requiring compensation where "right of ingress and egress formerly enjoyed by appellees ha[d] been taken"); State v. Tolliver, 246 Ind. 319, 332, 205 N.E.2d 672, 678 (1965) (finding a taking where the closing of the highway removed "any suitable access to [appellees'] steel fabricating business"); State v. Jordan, 247 Ind. 361, 366-69, 215 N.E.2d 32, 34-36 (1966) (finding no compensable taking where drug store experienced declining patronage on account of road construction); Papp v. City of Hammond, 248 Ind. 637, 646-53, 230 N.E.2d 326, 332-35 (1967) (holding that filling station owner was not entitled to damages for loss of business where construction rendered abutting streets

cases addresses a unique set of facts, but collectively they affirm the distinction first drawn in Ensley: although an elimination of rights of ingress and egress constitutes a compensable taking, the mere reduction in or redirection of traffic flow to a commercial property is not a compensable taking of a property right. See also State v. Dunn, 888 N.E.2d 858, 864-66 (Ind. Ct. App. 2008) (explaining the differences between traffic-flow cases and the ingress/egress cases), trans. denied.

Here, as in Ensley, the subject property had two points of access. The State appropriated a strip of land from the property to widen an abutting road, and as part of the same project the State constructed a median preventing southbound access through the southern entrance. Moreover, because of the restrictions on new access points along the appropriated strip of land, the owners cannot widen or move the entrances to the property. Neither of

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impassable); State v. Diamond Lanes, Inc., 251 Ind 520, 523-24, 242 N.E.2d 632, 634 (1968) (finding sufficient evidence of compensable taking where "appellee's access ha[d] been both materially and substantially obstructed and reduced," at least one access point was "completely eliminated," and the substituted access could "in no way be equated with the former access; Beck v. State, 256 Ind. 318, 320-23, 268 N.E.2d 746, 747-49 (1971) (holding that loss-of-access instruction was properly submitted to the jury where property owners' "main body of land was cut off from [h]ighway" by a limited access fence); Bussing v. Ind. Dept. of Transp., 779 N.E.2d 98, 105 Ind. Ct. App. (2002) (affirming judgment that no compensable taking occurred, where median installation and elimination of left turn lane "simply require[d] drivers to travel a more circuitous route" to apartment complex). trans. denied.

the property's existing access points has been eliminated or narrowed as a result of the condemnation. Nor have any of the reconfigurations deprived the owners of their rights of ingress or egress. The only substantive allegation is that traffic flow to the shopping complex has been encumbered. Under Ensley and its progeny, these consequences from the State's roadway improvements are not compensable because no property right has been taken.

The Court of Appeals distinguished this case from Ensley by noting that here the State not only constructed a raised median converting Plaza East's southern entrance to a right-in/right-out drive, but also added a merge lane to Green River Road and created unsafe congestion problems at the northern entrance. Kimco, 881 N.E.2d at 995. We agree that the merge lane and northern entrance congestion are two aspects of this case that were not present in Ensley. But neither the merge lane nor the northern entrance congestion affects the fundamental point that these consequences are not attributable to the deprivation of any property right. The Ensley Court held unequivocally that commercial property owners "have no property right in the free flow of traffic past their premises." 240 Ind. at 490, 164 N.E.2d at 350. Any difficulty that northbound traffic may experience with the merge lane, and any congestion that may arise at the northern entrance from the permission of left turns, bear only on the issue of public traffic flow through the property and not on Kimco's rights of ingress of egress.

Kimco notes that the State obtained "permanent extinguishment of all rights and easements of ingress and egress" along the appropriated strip of land. But the effect of this order is simply to preserve Plaza East's entrances and confine Plaza East to the access points it enjoyed before the taking. The State did not extinguish any existing points of ingress or egress. And it is well settled that a "property owner is not entitled to unlimited access to abutting property at all points along the highway." Ensley, 240 Ind. at 486 164 N.E.2d at 348; see also Beck v. State, 256 Ind. 318, 323, 268 N.E.2d 746, 749 (1971) ("It is true that the existence of the highway across the appellants' lands prior to the acquisition of limited access facilities gave the abutting property owners a right of ingress and egress from their property to the highway. This does not mean, however, that they were entitled to free access at every foot along their road frontage.").

Kimco also cites State v. Peterson, 269 Ind. 340, 381 N.E.2d 83 (1978), in support of its position. In Peterson, the defendants owned a triangular parcel of land that abutted old U.S. 30 and new U.S. 30 but had no established entrance on either. 269 Ind. at 342, 381 N.E.2d at 84. The subject property "was not entitled to full or unlimited access rights to the highways. However it was entitled to access to either or to both, in accordance with governing statutes and case law." Id. (citing Ensley, 240 Ind. at 486, 164 N.E.2d at 348). The State converted new U.S. 30 to limited access which completely extinguished the landowners' access rights along that route, but had no effect on access to old U.S. 30. Id. In the subsequent eminent domain proceeding,

the trial court refused the State's tendered instruction that "Loss of access is compensable ... only when no other reasonable means of access is available to the property." Id. at 341, 381 N.E.2d at 84. This court affirmed, explaining that

> if the highest and best use before the taking is for one purpose and because of the access available after the taking, the property was no longer suitable for that use, but was still suitable for a less valuable use, the owner would be entitled to the damages reflecting the diminished value.

Id. at 343, 381 N.E.2d at 85. The Peterson Court found the State's instruction "confusing and misleading" without this additional explanation:

> "Other reasonable means of access," as used in this instruction, does not mean access that is reasonable for some other use of the land. Rather, it refers to other access that will permit the land to be used for that purpose regarded as its highest and best use immediately before the take.

Id. at 344, 381 N.E.2d at 85. This language addressed damages from a taking that rendered the land unusable for its highest and best use. Elimination of all access to new U.S. 30 may have met the test. But Kimco did not suffer a compensable taking of access in the first instance. Although the State precluded any new access points along Green River Road, Plaza East's existing drives remained intact, and its use as a shopping center

remained. As a matter of law, under Ensley, the redirected traffic flow is not a deprivation of a property right.

Neither the construction of the median alone, nor the hypothetical conversion of Green River Road to a one-way street, would have constituted a compensable taking by the State. Kimco argues, however, that the State's roadway improvements, in conjunction with the appropriation of the 0.154-acre strip and temporary construction easement, taken together, opened the door to consequential damages from impaired traffic flow at the shopping complex. This argument was squarely addressed and rejected in Ensley. Ensley itself involved both the appropriation of a strip of land from the commercial property and the simultaneous construction of a raised divider strip cutting off northbound traffic from the Keystone Entrance. The Court found the two actions to be "separate improvements." 240 Ind. at 488, 164 N.E.2d at 349. The taking of land was compensable, but the effects of the new median were not. Kimco argues that "evidence of impaired access is admissible regardless of whether it is separately compensable." Br. of Appellee 32. We do not agree. Under Ensley, physical takings and coincident roadway improvements are distinct actions, even if concurrent.

Conclusion

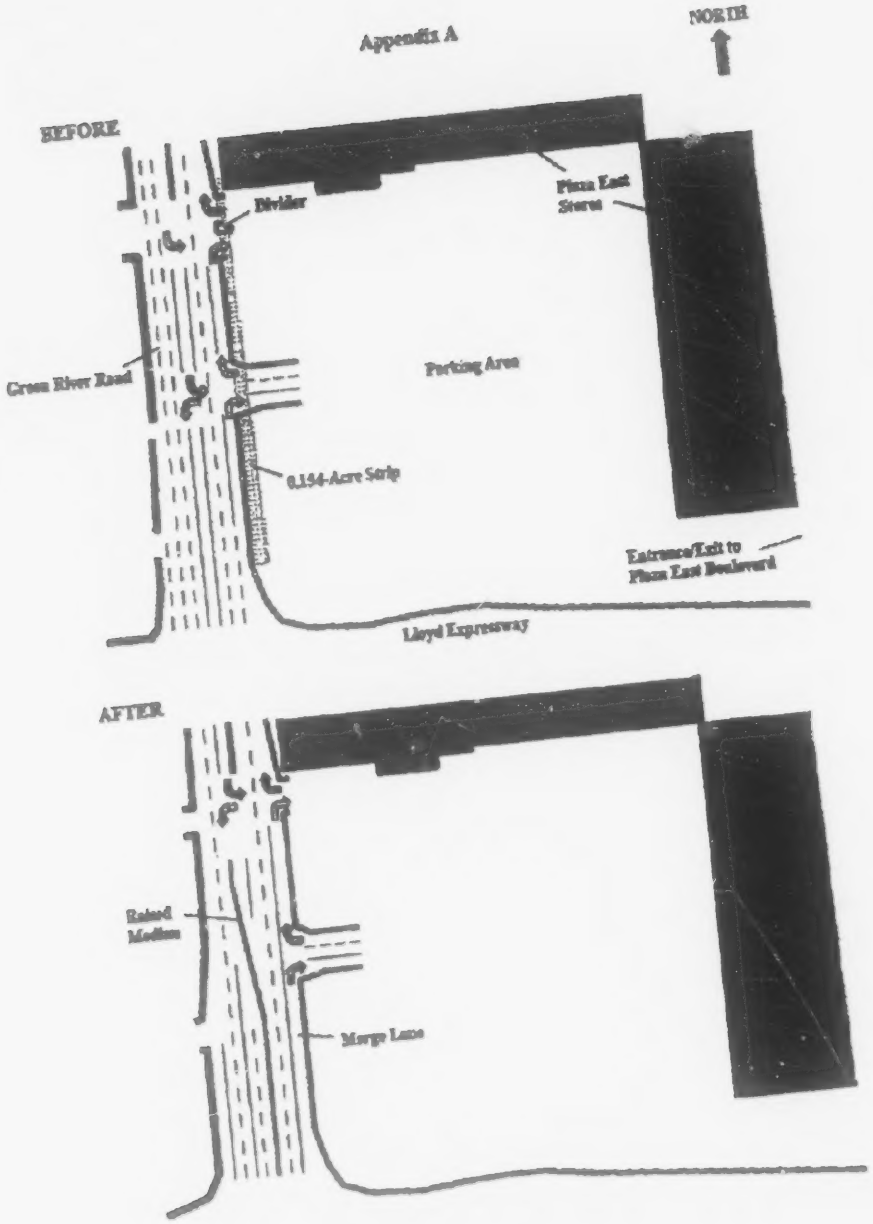
Given the record testimony assessing the compensable takings at no more than $100,700, the $2,300,000 verdict is excessive as a matter of law. The judgment of the trial court is reversed and the

cause remanded for proceedings consistent with this opinion.

Shepard, C.J., and Sullivan, J., concur.

Dickson and Rucker, JJ., dissent believing that the Court of Appeals correctly decided this case.

Appendix A


NORTH
BEFORE
Divider
Plaza East Street
Green River Road
Parking Area
0.194-Acre Strip
Entrance/Exit to Plaza East Boulevard
Lloyd Expressway
AFTER
Raised Median
Merge Lane

FOR PUBLICATION **FILED 10/31/07**

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IN THE COURT OF APPEALS OF INDIANA

No. 82A01-0607-CV-301

STATE OF INDIANA,
Appellant-Plaintiff,

v.

KIMCO OF EVANSVILLE, INC.,
n/k/a KCH ACQUISITION, INC., THE

FRANKLIN LIFE INSURANCE COMPANY,
And VANDERBURGH COUNTY, INDIANA,
Appellees-Defendants.

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0006-CP-315

October 31, 2007

OPINION-FOR PUBLICATION

BARNES, Judge

Case Summary

The State appeals the jury's verdict in favor of Kimco, et al., in the amount of $2,300,000.00 for an appropriation of Kimco's real estate in 2000. We affirm.

Issue

The State raises two issues, which we consolidate and restate as whether Kimco is entitled to damages for its loss of access to a public thoroughfare.

Facts

Kimco owns Plaza East Shopping Center ("Plaza East") in Evansville located at the intersection of State Route 66, also known as the

Lloyd Expressway, and Green River Road. Green River Road runs north and south, and the Lloyd Expressway runs east and west. Plaza East had no ingress or egress along the Lloyd Expressway.[1]

Plaza East's primary entrance was the southern entrance on Green River road ("Southern Entrance"). The southern Entrance allowed access to the center of Plaza East's parking lot. The Southern Entrance also allowed shoppers to enter from and exit to both directions on Green River Road.

Plaza East's secondary entrance was the northern entrance on Green River Road ("Northern Entrance"). The Northern Entrance was immediately next to the sidewalk in front of the stores and was narrower than the Southern Entrance. The Northern Entrance allowed "right-in/right out" access for northbound travelers on Green River Road.[2] Exhibit Y-1.

On June 23, 2000, the State filed a complaint to appropriate .154 acres of Plaza East along Green river Road as part of a construction project aimed at improving access to and from the Lloyd Expressway.

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[1] Plaza East was built as an "at grade shopping center" bordering Division Road. Tr. p. 99. In a previous condemnation action, the State "took the access on Division Road for the Lloyd Expressway[.]" Id. As one witness explained, in the first taking, "the highway was elevated, and that changed the whole complexity of the shopping center." Id. at 534. This previous taking is not at issue today.

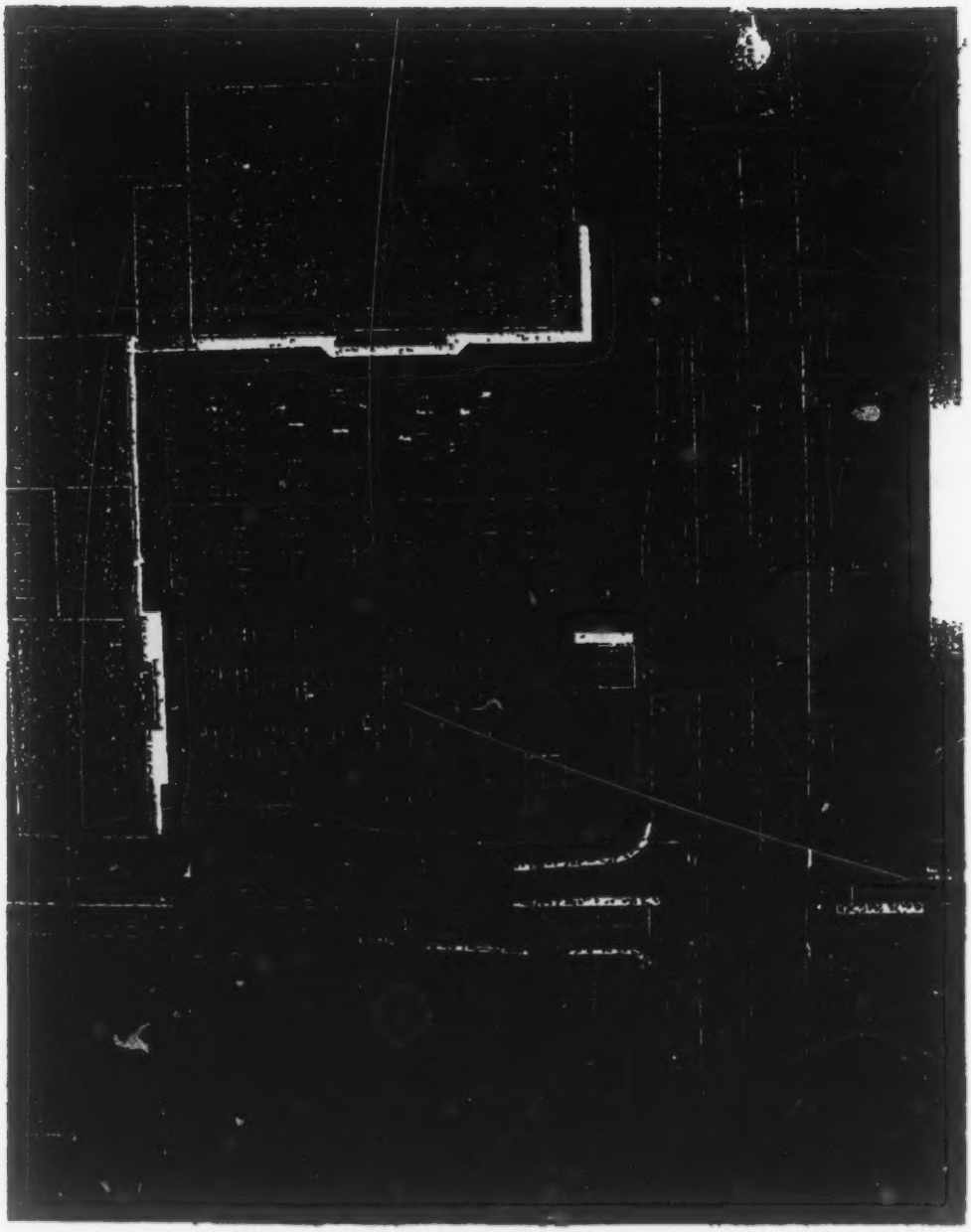
[2] There is also access to Plaza East from Plaza East Boulevard, which runs behind Plaza East.

To facilitate construction, the State also sought a temporary appropriation of .048 acres, encompassing the Southern Entrance and the Northern Entrance of Plaza East. The complaint also requested to permanently limit the ingress and egress associated with Plaza East. The trial court allowed the State to take the property described in the complaint, but the issue of damages remained unresolved.

When construction was completed in 2004, shoppers traveling southbound on Green river Road could only enter Plaza East through the Northern Entrance because the State had constructed a concrete median blocking southbound access to the Southern Entrance. Shoppers traveling northbound on Green River Road could access Plaza East via the Southern Entrance only after crossing a solid white line, or they could access Plaza East via the Northern Entrance.

Shoppers exiting Plaza East could only use the Southern Entrance to turn right (or north) onto Green River Road because they could not cross the newly constructed concrete median to turn left (or south). Shoppers could exit Plaza East in either direction from the Northern Entrance. Because of the amount of traffic on Green River Road, however, the Northern Entrance was congested and cars became "stacked" immediately in front of the stores, making it more difficult for pedestrians to navigate the parking lot. For purposes of clarity, we include these depictions of Plaza East and Green River Road before and after the construction.

BEFORE:



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AFTER:

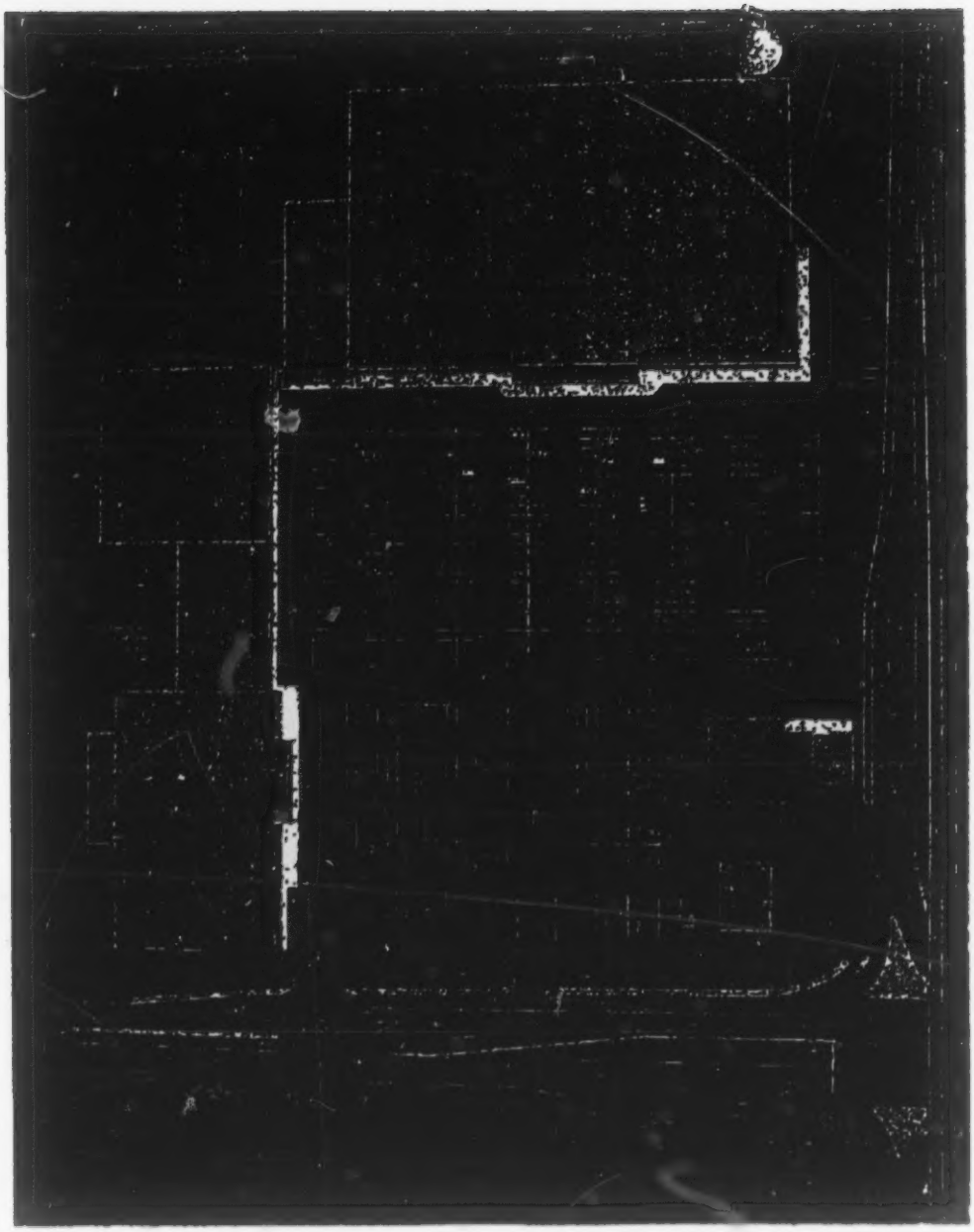

Exhibit V

During and after the construction process the stores located in Plaza East experienced declining sales. Plaza East went from 94% occupied in 2004 to 56% occupied at the time of trial in 2006. In an effort to keep one of the remaining tenants, Kimco renegotiated a lease for approximately $90,000.00 per year less that the previous $150,000.00 per year lease.

Prior to the appropriation, Plaza East was in average condition and functional, and it was considered a Class B community shopping center by one real estate appraiser. After the appropriation, Plaza East was less convenient to shoppers and was considered less desirable in the real estate market. Plaza East was reduced to a Class C community shopping center.

On February 9, 2006, after a four-day trial was held, a jury returned a verdict in favor of Kimco in the amount of $2,300,000.00. The trial court entered judgment on this verdict and awarded Kimco costs and interest, for a total judgment against the State in the amount of $3,196,859.82. On March 13, 2006, the State filed a motion to correct error. After a hearing, the trial court denied the motion to correct error. The State now appeals.

Analysis

This case comes to us after the damages phase of the condemnation proceedings. Condemnation proceedings involve two stages: 1) the initial or summary phase, and 2) the phase in which the finder of fact determines damages. City of

Hammond v. Marina Entm't Complex, Inc., 733 N.E.2d 958, 966 (Ind. Ct. App. 2000), trans. denied. "During the initial or summary phase of the proceedings, the action consists solely of legal issues which are decided by the trial court." Id. After a consideration of the legality of the action and any objections that may have been filed, the trial court concludes this phase of the proceedings by entering an order of appropriation and appointing appraisers to assess the damages. Id. During the second stage of the condemnation proceedings the fact finder must determine the amount of damages sustained by the landowner. Id.

It is undisputed that the State took, and Kimco is entitled to damages for, the .154-acre parcel and the temporary construction right of way. The essence of the State's argument, however, is that Kimco cannot be compensated for its loss of access to Green River road as a matter of law. Accordingly, the State asserts that the trial court improperly admitted evidence of damages associated with the loss of access and improperly instructed the jury regarding loss of access and that the jury's verdict is excessive because it is based on the loss of access.

As an initial matter we must consider the parties' arguments regarding whether a loss of access amounts to a taking is a question of law or a question of fact. For example, Kimco argues, "The determination of the impairment of access issue belongs to the jury, where it was placed by the trial court." Appellees' Br. p. 30. The State responds, "Kimco has presented no authority establishing that access issues are always jury questions merely

because there is a pattern jury instruction[3] in Indiana relating to access issues .... Whether loss of access is compensable has been treated as a legal question in a number of relevant cases." Appellant's Reply Br. p.2.

Indeed, Indiana courts have been inconsistent, at best, in considering whether loss of access is a factual or legal question.[4] Compare State v.

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[3] Jury instruction 10 was based on Pattern Instruction 29.27 and provided:

> In order for you to award damages for loss of access, Kimco must have suffered a particular, private injury resulting from a substantial and material interference with Kimco's rights of ingress and egress which are special and peculiar to this property and when no other reasonable means of access are available.
>
> You may not award damages for loss of access if the remaining access is merely more inconvenient or difficult, as long as it is reasonable.
>
> "Other reasonable means of access," as used in this instruction, does not mean access that is reasonable for some other use of the land. Rather, it refers to the access that will permit the land to be used for that purpose regarded as its highest and best use immediately before the taking.

App. p. 175.

[4] Another example of the inconsistencies among decisions can be found when comparing language in State v. Ensley, 240 Ind. 472, 490-91, 164 N.E.2d 342, 350-51 (1960) with State v. Stefaniak, 250 Ind. 631, 638, 238 N.E.2d 451, 455 (1968). In Ensley, the court stated:

Diamond Lanes, Inc., 251 Ind. 520, 524, 242 N.E.2d 632, 634 (1968) ("There was substantial evidence for the jury to find that appellee's access was substantially and materially impaired and to award damages on the basis that the value of appellee's property had been reduced by the new construction."); State v. Stefaniak, 250 Ind. 631, 638, 238 N.E.2d 451, 455 (1968) ("[I]t is our opinion that the question of a compensable taking is a matter for the jury's determination. Each case of this nature must be grounded upon its own particular set of facts."); and Jenkins v. Board of County Comm'rs of Madison County, 698 N.E.2d 1268, 1270 (Ind. Ct. App. 1998) ("Whether the interference is substantial is a factual question which must be resolved in each case by the trier of fact."), trans. denied; with State v. Ensley, 240 Ind. 472, 491, 64 N.E.2d 342, 351 (1960) ("Since the verdict of the jury included compensation of the alleged partial impairment of appellees' right of access resulting from the

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> This court takes judicial notice of the ever-increasing problems of traffic control with which a thriving metropolitan area is confronted. The creation of such facilities as limited access highways, one-way streets, express thoroughfares and other methods of construction such as that involved in the present case, is to be encouraged in the interest of traffic control and regulation to the end that the general welfare and safety of the public may best be served.

Ensley, 240 Ind. at 490-91, 164 N.E.2d at 350-51. Only eight years later, our supreme court stated, "We are actually concerned with how much leeway the State is given n building highways." Stefaniak, 250 Ind. at 638, 238 N.E.2d at 455.

construction of the divider strip and since this was not a proper element of damages, the verdict was contrary to law."). However, our supreme court has recently clarified that whether a taking has occurred is a question of law. Biddle v. BAA Indianapolis, LLC, 860 N.E.2d 570, 575 (Ind. 2007).

Biddle addressed whether aircraft noise amounted to a taking of property near the Indianapolis airport. Biddle was framed as an inverse condemnation case in which the landowners appealed the granting of BAA's motion for summary judgment. Our supreme court observed, "Although takings cases may be extremely fact sensitive, the ultimate application of constitutional provisions to an established set of facts involves a pure question of law." Id. at 575. "Once a taking is found, the question of how much compensation to award is then appropriate for a trier of fact." Id.

Based on Biddle's clarification of this issue, we conclude that whether the State took Kimco's access rights is a question of law. The broad language of the State's complaint and the trial court's order of appropriation,[5] the trial court's ruling on the

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[5]In the State's complaint, it sought to appropriate the .154 acre parcel. Following the legal description of this parcel, the complaint stated:

> TOGETHER with the permanent extinguishment of all rights and easements of ingress and egress to, from, and across the limited access facility to be know as S.R. 66 and Green River Road ...) to and from the owner's abutting lands along the line or lines described as follows [legal description omitted]. This restriction shall be a covenant running with the

admissibility of evidence, the trial court's denial of the State's motion for judgment on evidence during trial, and the trial court's instruction of the jury might each be considered a legal conclusion that a taking of Kimco's access rights occurred. Regardless of the procedure, our review is the same because we review questions of law de novo. See Chamberlain v. Walpole, 822 N.E.2d 959, 961 (Ind. 2005) ("This presents a question of law that we review de novo."). If a taking was established as a matter of law, it was then for the jury to decide what, if any, damages were compensable.

The central case relied on by both parties is Ensley v. State, 240 Ind. 472, 164 N.E.2d 342 (1960). In that case, the Ensleys owned property on Keystone Avenue in Indianapolis that abutted 61st Street on the south and 62nd Street on the north. the State condemned a strip of property adjacent to Keystone Avenue to widen the road.

Prior to the construction, there were two entrances to the recreation facility that the Ensleys operated on the property. One was a sixty-five to sixty-eight foot entrance along Keystone Avenue that allowed north and southbound traffic to enter from

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land and shall be binding on all successors in title to the said abutting lands.

App. p. 25 (emphasis added). The complaint then went on to describe taking the Northern Entrance and Southern Entrance "for the purpose of constructing a driveway for service to the owner's private property" that would revert to Kimco on December 31, 2004. Id. The trial court issued an order of appropriation that included the same description of property as was in the complaint.

Keystone Avenue. The second entrance was fifty feet wide on 62nd Street. After construction, the Keystone Avenue entrance was reduced to forty feet, and because of the divider strip, only southbound traffic (right in/right out) could use the entrance. After construction, northbound traffic was required to enter the property via the 62nd Street entrance. The issue of damages was tried by a jury, who returned a verdict in favor of the Ensleys.

The State appealed, asserting, "damages if any, caused by the placing of a divider strip in the center of the new highway are not compensable; and that the divider strip was installed for the purpose of traffic regulation and control ...." Ensley, 240 Ind. at 479, 164 N.E.2d at 345. The Ensleys responded:

> they are not only entitled to damages occasioned by the taking of a portion of their land, but also to consequential damages ... for the alleged depreciation in the value of their remaining property caused by an alleged material interference with their right of ingress and egress resulting from the construction of a divider strip on Keystone Avenue between 61st and 62nd Streets.

Id., 164 N.E.2d at 345.[6]

Our supreme court held:

> The question which we understand the State to have presented is that damages, if any,

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[6] The statute relied on in Ensley is substantially similar to that in effect today. See Ind. Code § 32-24-1-9(c).

> caused by the alleged material interference with the right of ingress and egress, are not the direct result of the taking of appellees' land but result from the manner in which the highway is constructed, and hence, are not compensable under the factual situation in this case, and because the verdict of the jury included such damages it is, therefore, contrary to law.

Id. at 480, 164 N.E.2d at 345.

The court clarified that the land condemned for the widening of Keystone Avenue was not causally connected to the impaired right of access based on the divider strip. Id. at 488, 164 N.E.2d at 349. Accordingly, any damages for the interference with the Ensleys' right of access must have resulted from a taking of access. See Id., 164 N.E.2d at 349. The court also recognized "that there is no property right of an abutting property owner in the free flow of traffic past his property and thus no compensation can be claimed if traffic diverted from his premises or made to travel a more circuitous route." Id. at 489, 164 N.E.2d at 350.

The court observed:

> It is well-settled that acts done in the proper exercise of governmental powers and not directly encroaching on private property, although their consequences may impair its use or value, do not constitute a "taking" within the purview of the constitutional provision prohibiting taking of private

> property for public use without just compensation.

Id. at 482, 164 N.E.2d at 346 (footnote omitted). Said another way, "Nor is an abutting property owner entitled to damages merely for 'a partial limitation and obstruction' of the right of access. Such right must be substantially or materially interfered with or taken away." Id. at 491, 164 N.E.2d at 351.

The court concluded, "The fact that access to the appellees' property from Keystone Avenue may have been made more circuitous and inconvenient by the manner in which the improved highway was constructed does not, upon the record here, constitute a 'taking' of private property." Id. at 486, 164 N.E.2d at 348. The court held that the trial court's judgment in favor of the Ensleys was contrary to law and reversed. Id. at 491, 164 N.E.2d at 351.

Since Ensley, our supreme court has recognized the complexity of the loss of access issue. For example, in State v. Jordan, 247 Ind. 361, 366, 215 N.E.2d 32, 35 (1966), the court stated, "The question of damages to a business operated on real estate not taken by reason of the construction or repairs of a highway has plagued the courts of this and other jurisdictions for some time." More recently our supreme court has observed:

> Some of our own inverse condemnation cases have labeled the required degree of harm for takings a "special" or "peculiar"

> injury. "In order to receive compensation in a condemnation action the landowner must show that the injury is special and peculiar to his real estate and not some inconvenience suffered by the public generally." This requirement has two aspects to it. First, the injury must be different in kind from what the public experiences. Second, the injury must be of a degree that exceeds mere inconvenience.
>
> Neither of these seems to add much to the task of identifying takings. It merely states the obvious to observe that to have a plausible takings claim one must experience a burden not shared by the public generally. And one who suffers "mere inconvenience" likely possesses an extraordinarily weak takings claim.

Biddle, 860 N.E.2d at 580 (citations omitted).

As an example of the range of precedent available to us, we consider State v. Geiger & Peters, Inc., 245 N.E.2d 143, 196 N.E.2d 740 (1964), in which our supreme court concluded that a compensable taking had occurred. Geiger involved a suit against the State for inverse condemnation after the expansion of Madison Avenue in Indianapolis. In this case the construction of a new expressway cut off ingress and egress to and from Madison Avenue. to reach the expressway from Geiger's property, traffic had to enter Caven Street to the south, then proceed east on Caven Street approximately two blocks over a raised railroad crossing and then south

or north by circuitous routes to reach more distant interchanges. Also, "the new dead-end narrow service road to the west side of appellees' property was not adequate to transport the steel beams and trusses 90 feet in length which were fabricated at lessees' plant ...." Geiger, 245 Ind. at 147, 196 N.E.2d at 740.

In determining whether there had been a taking, our supreme court recognized its prior holding in Ensley and stated, "in fact, in the [Ensley] case we specifically recognized the rule that an abutting property owner has an easement of ingress and egress to and from a public highway which constitutes a property right and cannot be substantially or materially interfered with or taken away without due compensation[.]" Id. at 149, 196 N.E.2d at 742-43. Although Geiger still had limited access to Caven Street, the court concluded:

> Appellant cannot equate appellees' previous right of access to old Madison Avenue which led to the north and south through the entire city of Indianapolis, with access solely to the narrow dead-end service road which leads nowhere to the north and nowhere to the south except to Caven Street. Whether appellant calls the dead-end service road old Madison Avenue or not, in reality it is not the highway to which appellees previously had access. The injury to appellees is special and peculiar and is different in this case from that sustained by the public at large. The construction work done on old Madison Avenue and the land immediately west

> thereof to make a new super highway out of old Madison Avenue, and the creating of obstructions and embankments cutting off appellees' right of ingress and egress to and from the highway, was a taking of appellees' property rights for which they were entitled to compensation in eminent domain.

Id. at 150-51, 196 N.E.2d at 743; see also Diamond Lanes, 251 Ind. at 523-24, 242 N.E.2d at 634 (concluding that where access completely changed during construction there was substantial evidence for the jury to find that access was substantially and materially impaired and to award damages); Hastings v. State, 246 Ind. 475, 483, 206 N.E.2d 874, 878 (1965) (concluding that where no land was taken but owners were deprived of direct access to a new limited access highway, compensation was required); State v. Tolliver, 246 Ind. 319, 331-32, 205 N.E.2d 672, 678 (1965) (concluding that bridge capable of holding only 3000 pounds was not sufficient alternative route for steel manufacturing plant whose trucks carried loads of fifty tons of steel and injury was far greater than that suffered by the general public).

In likening the facts before us today to those in Ensley, the State argues that "Kimco's alleged loss ... is legally an inconvenience, at most, suffered by Kimco and the public in general, and therefore, Kimco had no right to recover damages based on this claim." Appellant's Br. p.28. On the other hand, Kimco asserts, "The trial court followed Ensley in recognizing that there is a right to recovery for impaired access when the substantial/material

interest test is met." appellees' Br. p. 26. Kimco also points out that unlike Ensley this case involved the construction of a median, the solid white line, the inability to widen or change the Northern and Southern Entrances, and the loss of access from the first taking.

We agree with Kimco to the extent that, unlike in Ensley, Plaza East's loss of access is not based simply on the construction of the median but also, and importantly, on the reconfigured entrances on Kimco's property. In addition to the median, which limited left hand turns into and out of Plaza East at the Southern Entrance, the State constructed an acceleration lane defined by a solid white line abutting Plaza East that patrons were required to cross to turn into the Southern Entrance.

Also, by making the narrower Northern Entrance the main entrance into Plaza East, cars became stacked immediately in front of the stores, creating substantial congestion. In addition to the congestion at the Northern Entrance, one expert stated that this configuration would cause "safety problems and conflict with pedestrians walking inside the shopping center." Exhibit O p. 14. This same expert testified that the post-construction traffic configuration "is an unsafe entry." Tr. p. 176.

Any one of these changes by itself might not amount to a taking of access rights. When considering all of these changes, however, we conclude that a taking has occurred as matter of law. The State's reconfiguration of Green River road and the changes to the Southern Entrance and Northern

Entrance are peculiar to Plaza East and Kimco, and the changes are "of a degree that exceeds mere inconvenience." Biddle, 860 N.E.2d at 580. Although, as the State argues, it "took no point of egress and ingress from Kimco," the entrances were not the same entrances that existed prior to the appropriation. Appellant's Br. p. 27. Under these specific facts, we conclude that this case is distinguishable from Ensley.

Given the nature of Kimco's business and the specific changes in accessibility, especially the safety concerns, we conclude that Kimco's injury was different from what the public experienced and amounted to more than mere inconvenience. Thus, Kimco suffered a taking of its access rights to Green River Road as a matter of law.

Accordingly, the trial court properly put before the jury the issue of what, if any, damages were compensable. The trial court properly admitted evidence and instructed the jury regarding damages relating to loss of access. Because the State does not argue that the jury's verdict is not supported by the evidence, we conclude it was within the jury's prerogative to award Kimco $2,300,000.00 in damages.

Conclusion

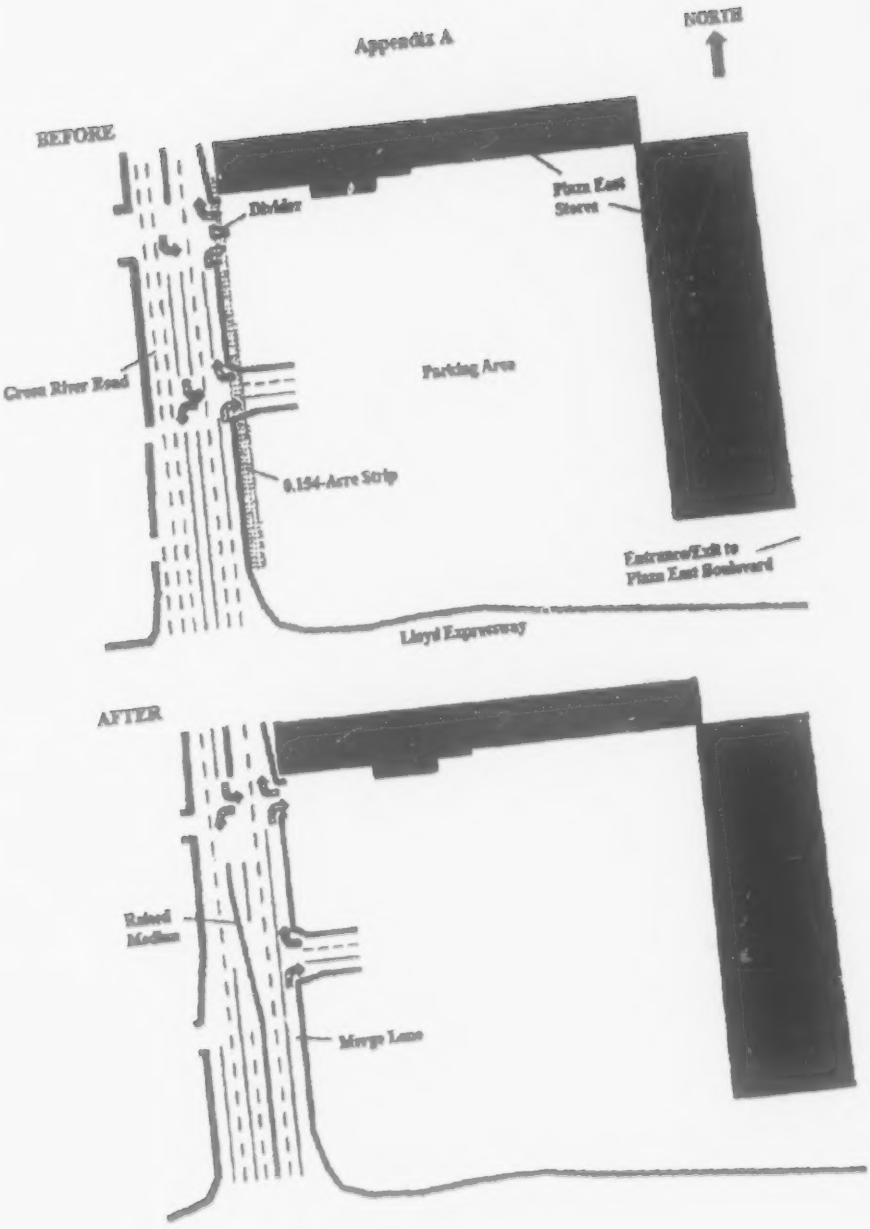
Given these specific facts, we conclude that Kimco suffered a taking of its access rights as a matter of the law, and the jury properly determined the amount of damages for the taking suffered by Kimco for its loss of access. The trial court properly

admitted evidence related to loss of access and properly instructed the jury regarding loss of access. Further, the jury's verdict is not excessive because Kimco's loss of access was a proper consideration when assessing damages. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.

Appendix A


NORTH
BEFORE
Divider
Plaza East Street
Green River Road
Parking Area
0.154-Acre Strip
Entrance/Exit to Plaza East Boulevard
Lloyd Expressway
AFTER
Raised Median
Merge Lane

147

(3)

Supreme Court, U.S.
FILED
DEC 7 - 2009
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No. 09-197

IN THE

Supreme Court of the United States

KIMCO OF EVANSVILLE, INC.
N/K/A/ KCH ACQUISITION, INC.,
THE FRANKLIN LIFE INSURANCE COMPANY
AND VANDERBURGH COUNTY, INDIANA,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Indiana

BRIEF IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

When the State condemns a strip of land as one part of a capital improvement project, does "just compensation" include all economic injuries owing to the *entire* project?

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STATEMENT OF THE CASE

This case involves the proper valuation of a strip of land that Indiana condemned for use in a roadway improvement project. The Indiana Supreme Court held that the value of the condemned parcel does not include incidental and consequential losses from the entire project of which the condemnation was only one part. Kimco claims the valuation should include all lost commercial value of its strip-mall property owing to traffic-flow restrictions caused by the project, regardless whether those losses were proximately caused by the State's use of the condemned parcel. Kimco, however, has neither preserved a federal constitutional challenge nor demonstrated any lower court conflict or pressing national concern over this issue, so the Court should deny the Petition.

1. Plaza–East Shopping Center, which is owned by Kimco, sits at the intersection of the Lloyd Expressway and Green River Road in Evansville, Indiana. Pet. at 6. Plaza East has no ingress or egress onto the Lloyd Expressway, but does have two entrances on Green River Road. *Id.* Prior to the State's roadwork at issue here, Plaza East's southern entrance allowed drivers to enter and exit the shopping center from either direction. Pet. App. at A-47. The northern entrance was divided such that only northbound drivers could enter or exit the property. *Id.*

In 2000, the Indiana Department of Transportation concluded that it was necessary to improve Green River Road in order to reduce traffic

conflicts and delay times at the intersection with the Lloyd Expressway. Pet. App. at A-7. On June 23, 2000, the State of Indiana filed a Complaint for Appropriation of Real Estate against Kimco seeking to (1) condemn a 0.154 acre strip of the 14.339 acre Plaza East property, (2) obtain a construction easement of 0.048 acres until December 31, 2004, and (3) impose a permanent limit on Plaza East's ingress and egress. Pet. App. at A-28, A-29. The Complaint included a sketch of the real estate and the proposed improvements to it. Appendix of Appellant at 29, *State of Indiana v. Kimco of Evansville*, 881 N.E.2d 987 (Ind. Ct. App. 2007) (No. 82A01-0607-CV-301) ("Ct. App. App.").

With respect to the condemnation, the State proposed to acquire the 0.154 acre strip to construct a new lane for, and thereby widen, Green River Road, which would provide a better lane for cars exiting the Lloyd Expressway heading northbound on Green River Road. Pet. App. at A-7. The State's plan also called for reconfiguring the lanes and installing a raised median on Green River. *Id.* Following construction, there would still be two northbound and two southbound lanes, and the shopping center would retain both of its pre-existing entrances at the same width. *Id.* In fact, the State planned to remove the pre-existing divider in the northern entrance to the shopping center, allowing full ingress and egress from both directions. *Id.* The new median on Green River Road, however, would prevent southbound motorists from using the southern entrance to the shopping center. *Id.* And, to preserve the benefits of the roadway improvements, the State's plan also called for

precluding further alteration of Plaza East's entrances and exits. Pet. at 9-10.

After Kimco failed to appear to contest the Complaint, the trial court entered an Order of Appropriation and Appointment of Appraisers. Pet. App. at A-7 n.3. The court instructed the court-appointed appraisers to consider "the damages, if any, to the residue of Defendant's real estate caused by Plaintiff's appropriation" and noted that "loss of access is compensable, if there is no other reasonable access to the residue[.]" Ct. App. App. at 36, 37. Based on these instructions, the court-appointed appraisers determined the total value of the condemned property to be $95,300. Pet. App. at A-7 n.3. The State deposited the full amount of the appraisal into Kimco's account on January 11, 2001. Brief of Appellant at 1, *State of Indiana v. Kimco of Evansville*, 881 N.E.2d 987 (Ind. Ct. App. 2007) (No. 82A01-0607-CV-301). The State then proceeded to improve the road according to its filed plan.

2. In May 2001, however, Kimco decided that the valuation was insufficient and filed a motion to submit a delayed reply to the appraisers' report. The trial court permitted Kimco to file exceptions and to request a jury trial on valuation. Ct. App. App. at 48. The case went to trial in February 2006, well after construction was completed.

Kimco contended at trial that under Indiana law it was entitled to damages due to a "loss of access" because the new median and merge lane restricted access to the southern entrance resulting in traffic congestion at the northern entrance. Pet. App. at A-

7, A-8. The State objected to this theory, but the trial court permitted Kimco to present evidence relating to the alleged "loss of access" and instructed the jury that Kimco was entitled to recover for this alleged loss. Pet. App. at A-8, A-9. So instructed, the jury valued the condemnation at $2,300,000, and on March 13, 2006, the trial court entered judgment for that amount along with prejudgment interest of $896,859.82, for a total judgment of $3,196,859.82. Pet. App. at A-9 & n.4.

3. The State appealed, arguing that the trial court erred by considering Kimco's loss-of-access evidence. The Indiana Court of Appeals affirmed, concluding that the construction of a raised median and exit lane adjacent to Kimco's property took valuable property interests from Kimco. *See* Pet. App. at A-44. The Court of Appeals, citing only Indiana law, found that "Plaza East's loss of access is not based simply on the construction of the median but also, and importantly, on the reconfigured entrances on Kimco's property." *Id.*

The Indiana Supreme Court granted the State's petition for discretionary review and reversed. Pet. App. at A-10, A-23; *State v. Kimco of Evansville*, 891 N.E.2d 50 (Ind. 2008) (table decision). Kimco, again citing only Indiana law in its brief, insisted that a median can lead to a "substantial and material impairment" of access rights. Brief of Appellee at 39, *State v. Kimco of Evansville*, 902 N.E.2d 206 (Ind. 2009) (No. 82S01-0806-CV-308). The Indiana Supreme Court, however, disagreed and emphasized the distinction between the value of the condemned parcel and other alleged consequential harms. It

observed that the State did not eliminate any access points, but merely (1) constructed a median that reduced the utility of Kimco's preferred access point, (2) eliminated a barrier to improve two-way access at another (albeit non-preferred) access point, and (3) precluded the expansion of existing access points or the creation of new ones. Pet. App. at A-20, A-21. Accordingly, because unlimited rights of access are not compensable property rights, the Indiana Supreme Court refused to attribute Kimco's consequential losses to the condemnation, saying that "[n]either the construction of the median alone, nor the hypothetical conversion of Green River Road to a one-way street, would have constituted a compensable taking by the State." Pet. App. at A-23.

The court remanded the case to the trial court for re-determination of the proper amount of damages according to the proper rules. Pet. App. at A-24.

Kimco petitioned the Indiana Supreme Court for rehearing, arguing for the first time that "just compensation" for a taking under the Fifth Amendment requires courts to attribute consequential losses likely to follow from a capital improvement project to the value of property the government condemns as part of that project. The Indiana Supreme Court denied rehearing without opinion. Pet. App. at A-1.

REASONS FOR DENYING THE PETITION

When State and local governments undertake public works projects, they must pay for the land they condemn—including residual or severance losses caused by the condemnation—but they are not otherwise responsible for negative financial consequences that the project may create for surrounding property owners. This is a well-established principle, and Kimco has failed not only to preserve a Takings Clause challenge to it, but also to cite any cases that contravene it.

I. Kimco Preserved No Federal Claims Below

A petition for writ of certiorari to review a state-court judgment must include, in the statement of the case, "specification of the stage in the proceedings, both in the court of first instance and the appellate courts, when the federal questions sought to be reviewed were raised[.]" Sup. Ct. R. 14.1(g)(i). In Kimco's Petition, the only reference to a specific stage in the proceedings in which a federal question was raised occurs in the last paragraph of the Statement of the Case, where Kimco says that the "brief submitted on its motion for rehearing to the Indiana Supreme Court . . . raised objection to the decision on the ground of violation of the United States Constitution." Pet. at 12. There is no reference to any other stage in the proceeding where the federal question was presented to the state courts, including the "court of first instance."

Furthermore, the Court "will not consider a petitioner's federal claim unless it was either

addressed by, or properly presented to, the state court that rendered the decision" under review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam). The Indiana courts never decided the federal questions for which Kimco seeks review. Rather, the Indiana Supreme Court's decision was based entirely on state law, particularly a state statute, Ind. Code § 32-24-1-9(c), and the case of *State v. Ensley*, 164 N.E.2d 342 (Ind. 1960). Pet. App. at A-15. The Indiana Supreme Court did reference federal law at the outset of its decision, but only to establish that article I, section 21 of the Indiana Constitution is "textually indistinguishable" from the federal Takings Clause. Pet. App. at A-11. In fact, the court stated that it was probably because Kimco could not win under federal law that "Kimco presents its case in terms of Indiana case law." Pet. App. at A-12. The court then rendered its decision under Indiana law, and in particular stressed that current Indiana statutes governing compensation for condemned property are functionally the same as the statutes in effect in 1960, when *Ensley* was decided. Pet. App. at A-23, A-16.

If the highest state court does not address the federal question presented, there is a rebuttable presumption "that the issue was not properly presented." *Adams*, 520 U.S. at 86-87 (citing *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987)); *see also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) ("when 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can

affirmatively show the contrary.'") (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)). The petitioners have the burden of "showing that the issue was properly presented to that court," *Adams*, 520 U.S. at 86, and they must demonstrate "that the state court had 'a fair opportunity to address the federal question that is sought to be presented here[.]'" *Id.* at 87 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)).

Kimco cannot make this showing because it did not assert a federal theory until its petition for rehearing in the Indiana Supreme Court. Generally, the Court will not "consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question." *Adams*, 520 U.S. at 89 n.3. In *Adams*, it was insufficient for petitioners to raise a federal due process claim in their state court petition for rehearing. *Id.* Similarly, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), a First Amendment vagueness and overbreadth challenge to a state statute had not properly been presented to the state courts, even though it was raised in the petition for rehearing. *Id.* at 549-50. Furthermore, the Indiana Supreme Court itself does not consider issues raised for the first time in a petition for rehearing. *See Griffin v. State*, 763 N.E.2d 450 (Ind. 2002).("A petitioner may seek rehearing only on points raised in the original brief.") (citing *Armstrong v. Hufty*, 55 N.E. 443 (Ind. 1901)). Therefore, Kimco has not preserved its federal claim and the Petition should be denied.

II. This Case Presents Neither An Unsettled Question of Federal Law Nor a Lower-Court Conflict of Any Kind

Kimco argues that the Indiana Supreme Court erred by considering "regulatory takings or inverse condemnation cases as controlling Petitioner's partial condemnation case." Pet. at 14. Its theory appears to be that, when the State, having already condemned a nearby strip of land, built a median in the middle of Green River Road and changed the traffic pattern in front of the shopping center, it effectuated a taking of the shopping center's property insofar as it caused that property to lose value.

However, the State built the median exclusively on its pre-owned property—not on property of Kimco that the state condemned. The only property that the State took from Kimco was the 0.154-acre strip of land (and the construction easement). The State used that strip of land to widen Green River Road by adding a traffic lane on Kimco's side of the road. It just happened to install the median that allegedly causes Kimco's consequential losses during the same construction project. It is true that the State also extinguished Kimco's rights to expand existing access points or create new ones, but Kimco does not argue that such rights constitute compensable takings—it simply tries to tack resulting losses onto the value of the condemned parcel.

A. Kimco cites no cases imputing all consequential injuries resulting from a capital improvement project to the value of a condemned parcel

Kimco's theory is that eminent domain compensation should include all incidental and consequential injuries caused by a capital improvement project. To bolster its theory, Kimco frames the State's "taking" not simply as the condemnation of the 0.154-acre strip of land, but as also including a "permanent extinguishment of all rights and easements of ingress and egress to and from Green River Road." Pet. at 9-10. First, the Green River Road project has only prevented Kimco "from adding new entrances on Green River Road or widening its existing access points." Pet. App. at A-6. The State has not reduced the access driveways themselves—and in fact the State eliminated a barrier on the north drive to allow full ingress and egress both directions. Pet. App. at A-7.

Second, as long as some access to real property remains, affecting ingress and egress does not constitute a compensable taking: a "property owner is not entitled to unlimited access to abutting property at all points along the highway." Pet. App. at A-21 (quoting *Ensley*, 164 N.E.2d at 348); *see also Beck v. State*, 268 N.E.2d 746, 749 (Ind. 1971) (while "abutting property owners [do have] a right of ingress and egress from their property to the highway[,] . . . they were [not] entitled to free access at every foot along their road frontage."). The State does not take a private property interest when traffic is "made to travel a more circuitous route" in order

to get to a commercial property. *Ensley*, 164 N.E.2d at 350. Nor does Kimco argue to the contrary.

Moreover, Kimco cites no precedent for the proposition that government agencies must compensate surrounding property owners for any diminution of value that results from a capital improvement project. Indeed, the Court has flatly rejected this proposition. *See United States v. 50 Acres of Land*, 469 U.S. 24, 33 (1984) ("the Fifth Amendment does not require any award for consequential damages arising from a condemnation"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428 (1982) (stating that this Court has consistently found that "government action outside the owner's property that causes consequential damages within" is not a taking); *Campbell v. United States*, 266 U.S. 368, 371 (1924) ("The proposed use of the lands taken from others did not constitute a taking of his property."); *see also W. Va. Pulp & Paper Co. v. United States*, 200 F.2d 100, 104 (4th Cir. 1952) ("The rule is that, even where lands are contiguous, the owner is not ordinarily entitled to damages accruing to tracts which are separate and distinct from the lands taken.").

Kimco seems to argue, however, that this case is distinguishable because, in the course of undertaking its road improvement project, the state happened to condemn a strip of land. That condemnation, it argues, opens the door to compensation for *all* loss in property value owing to the project, including losses related to the construction of the new median combined with

extinguishing Kimco's (otherwise non-compensable) right to expand its entrances and exits or create new ones. Kimco argues that the State must pay "severance damages" according to the "before and after" rule, which requires evaluation of "all the factors and possibilities that would affect the price a willing buyer would offer to a willing seller for the property." Pet. at 16-19, 21-23.

It is one thing to demand payment for "residual" or "severance" damages caused by the *condemnation*. Here, the appraisers valued the parcel at $95,300, *including* "damages . . . to the residue of Defendant's real estate caused by Plaintiff's appropriation." Ct. App. App. at 36, 37. It is quite another thing, however, to say that "residual" or "severance" losses include losses owing to *other* aspects of a capital improvement project. In this regard, the Indiana Supreme Court held that, because "acts done in the proper exercise of governmental powers and not directly encroaching on private property, although their consequences may impair its use or value, do not constitute a 'taking[,]'" the "severance" damages that Kimco seeks necessarily could not include any effect from the installation of the median or extinguishment of non-compensable rights to expand ingress and egress. Pet. App. at A-16 (quoting *Ensley*, 164 N.E.2d at 346).

The Court's just compensation precedents—including those cited by Kimco—support the Indiana Supreme Court's holding. In *United States v. Grizzard*, 219 U.S. 180, 181-82 (1911), part of the owner's farm land had been flooded to improve navigation on a creek, resulting in an obvious taking

of the flooded land. The flooded portion also cut off access to a road and the Court found that the owner should be compensated for this loss of access. *Id.* at 183. The Court stated that "[w]henever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from *that taking*[.]" *Id.* (emphasis added). However, no compensation is owed simply because a capital improvement project injures surrounding landowners without condemning their property. *Id.* at 184; *see also United States v. Miller*, 317 U.S. 369, 376 (1943) ("As respect[s] other property of the owner consisting of separate tracts adjoining that affected by the taking, the Constitution has never been construed as requiring payment of consequential damages"); *Sharp v. United States*, 191 U.S. 341, 355 (1903) ("It is solely by virtue of his ownership of the tract invaded that the owner is entitled to incidental damages. His ownership of other lands is without legal significance.") (quoting *Currie* v. *Waverly & N.Y. Bay R. Co.*, 20 A. 56 (N.J. 1890)).

Here, Kimco's additional alleged "damage to the remainder" does not result from the taking itself, but from the new median and extinguished rights to improve access, so *Grizzard* does not support additional compensation. Indeed, awarding compensation based on these aspects of the larger project would thwart the corollary proposition from *Grizzard* that the government owes nothing for consequential losses that occur apart from the condemnation itself. *Cf. United States v. 33.5 Acres*

of Land, 789 F.2d 1396, 1398 (9th Cir. 1986) ("[T]he land-owner must demonstrate that the taking caused the severance damages.") (quoting *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1448 (9th Cir. 1984)).

In the other cases cited by Kimco, the government was responsible only for remainder losses owing to the use of the *taken* land. *See Olson v. United States*, 292 U.S. 246, 256 (1934) ("Just compensation includes all elements of value that inhere in the property . . . . But the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking."); *United States v. 101.88 Acres of Land*, 616 F.2d 762, 769 (5th Cir. 1980) (finding no jurisdiction to hear a claim for damages to land not taken); *United States v. 158.24 Acres of Land*, 515 F.2d 230, 232 (5th Cir. 1975) (declining to treat condemned land as a severable plot completely owned by the plaintiff); *United States v. Chicago, B. & Q. R. Co.*, 90 F.2d 161, 167 (7th Cir. 1937) (holding that just compensation includes "proximate damages to . . . remaining property occasioned by the construction and use" of the *taken* land).

Kimco thus advances a theory of just compensation that has never prevailed—that condemning a parcel of land in connection with a capital improvement project opens the door to compensation for all consequential injuries the property owner may suffer as a result of the project. Even Kimco's *amici* acknowledge that "most states do not generally compensate condemnees for the

decrease in value attributable to changes in access" and asks the Court to create a new rule in that regard. Amicus Brief at 1. Neither Kimco nor its *amici* present compelling reasons, such as a lower-court conflict, for the Court to address this theory.

B. The Indiana Supreme Court properly applied just compensation law

Kimco misinterprets the decision below when it argues that the court improperly applied regulatory takings analysis instead of "partial condemnation" analysis. Pet. at 14-15, 21, 23. Because limiting access to real property is not itself a "physical occupation" as long as some access remains, the Indiana Supreme Court properly considered each allegation of a taking—one physical and one essentially regulatory—separately.

1. As the Indiana Supreme Court held, the State's exercise of its eminent domain powers over the strip of land, and its construction easement of the parking lot, were obviously physical, per se takings. *See* Pet. App. at A-11. The State is required to compensate Kimco for them, and the original appraisal focused on ensuring just that. The appraisal included $67,000 for the land taken and $5,750 for the temporary right of way. Ct. App. App. at 50-51. The appraisers provided more than $20,000 of value to compensate Kimco for "severance damages" owing to the condemnation itself. *Id.*

2. As for the work on Green River Road, the State did not physically occupy Kimco's property either when it installed the new median or when it prevented Kimco from undertaking one particular

use of its land (*i.e.*, to create larger or additional access points). Further, these actions were not "attributable to the deprivation of [Kimco's] property right" over the condemned parcel. Pet. App. at A-20. Under longstanding precedent, "the appropriation of a strip of land from the commercial property and the simultaneous construction of a raised divider strip" are, for the purpose of takings analysis, "separate improvements." Pet. App. at A-23 (citing *Ensley*, 164 N.E.2d at 349).

Thus, the impact of the roadway improvement project as a whole on Kimco's property had to be analyzed separately from the value of the condemned strip. The larger project could be said to constitute a "taking" only if it deprived Kimco "of all or substantially all economic or productive use" of the shopping center property. Pet. App. at A-11 (quoting *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40 (2005)). Yet the addition of the median and extinguishment of access-improvement rights, "if viewed separately from the taking of the 0.154 strip, plainly do not meet the *Lingle* test." Pet. App. at A-12. Kimco does not allege that any aspect of the Green River Road project has deprived it of "substantially all economic or productive use" of the Plaza East property. Pet. at 6-8. Accordingly, the Fifth Amendment does not require the State to pay Kimco's claimed $2,300,000 of lost value owing to the Green River Road project.[1]

---

[1] Requiring the State to pay compensation for this lost value would undermine the "reciprocity of advantage" theory that limits regulatory takings claims. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S.

III. The Indiana Supreme Court's Opinion Was Not a Judicial Taking and the Court Did Not Act as the Fact-Finder

In a last gasp effort to grab the Court's attention, Kimco argues that the Indiana Supreme Court's opinion constitutes a judicial taking. Pet. 26-27. If a claim for a judicial taking even exists, it is only in extraordinary cases such as when a decision "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents[.]" *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring). The Indiana Supreme Court, however, relied on *Ensley*, a case with remarkably similar facts decided in 1960. Pet. App. at A-5. The decision below occasioned no change in state law and was completely predictable from precedent.

Kimco also briefly argues that the Indiana Supreme Court improperly substituted itself in place of the jury as the finder of facts. Pet. at 27. Kimco's characterization is inaccurate—all the court did was overturn a verdict predicated on an erroneous understanding of the law. The jury was instructed that it could award damages for loss of access if Kimco "suffered a particular, private injury resulting

---

470, 491 (1987) ("[w]hile each of us is burdened somewhat by the restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."). The State's maintenance of safe and efficient roads and enforcement of traffic laws generally increases the value of Kimco's shopping center. Kimco does not pay a special tax when it benefits from road improvements, and it is not entitled to special compensation when it does not.

from a substantial and material interference with Kimco's rights of ingress and egress which are special and peculiar to this property and when no other reasonable means of access are available." Pet. App. at A-8, A-9. Because "physical takings and coincident roadway improvements are distinct actions, even if concurrent," however, the "loss of access" referred to in the instruction could not, as a matter of law, include losses resulting from "coincident road improvements." Pet. App. A-23. The jury was not so instructed, however, so its $2.3 million award was necessarily "excessive as a matter of law." Pet. App. at A-23.

Furthermore, the Court did not order the trial court to enter judgment on a particular value of the property; it merely remanded for further proceedings according to proper legal principles. Pet. App. at A-23, A-24. Accordingly, there was no improper finding of fact by the Indiana Supreme Court—only *de novo* review of the law.

Neither of these ancillary theories, therefore, is worth the Court's attention.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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In The Supreme Court of the United States

KIMCO OF EVANSVILLE, INC.
N/K/A KCH ACQUISITION, INC.,
THE FRANKLIN LIFE INSURANCE COMPANY
AND
VANDERBURGH COUNTY, INDIANA,
Petitioners,

v.

STATE OF INDIANA,
Respondent.

On Petition for Writ of Certiorari to the
Indiana Supreme Court

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INTRODUCTION

Issues involve besides Kimco, owners, tenants, financial institutions and law firms concerned with conflicts with federal laws and violations of the United States Constitution likely to occur by states following the precedent of Indiana Court's decision if its decision stands.

One feature of State's Response is failure to address federal courts decisions recognizing landowner's right to severance damages in partial condemnation cases. Another is avoiding recognizing substantial impairment of ingress or egress of Plaza East, uncontroverted by State.

Here is quotation from Indiana Supreme Court opinion creating the constitutional issue:

> "I. The Constitutional Background
>
> Article 1, section 21 of the Indiana Constitution provides that "No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." The Fifth Amendment of the U.S. Constitution similarly provides that "nor shall private property be taken for public use, without just compensation." The Fifth Amendment's Takings Clause applies to

the states via the Due Process Clause of the Fourteenth Amendment (cases cites). We have held that the state and federal takings clauses are textually indistinguishable and are to be analyzed identically, *Cheatham v. Pohle*, 789 N.A.2d, 467, 472-73 (Ind.2003) (citing *B & M Coal Corp. v. United Mine Workers of Am.*, 501 N.E.2d 401, 406 (Ind. 1986).

There is no question that an exercise of eminent domain, such as the condemnation of the 0.154 acre strip in this case, is a constitutional "taking." Other forms of governmental action, however, are "takings" only if they meet the prevailing federal standard, which is that government action affects a taking if it deprives an owner of all or substantially all economic or productive use of his or her property, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Factors considered under the foregoing text include the economic impact of the regulation on the property owner, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government action. *Penn Cem. Transp. Co. v. New York City*, 438 U.S. 164, 124, 98 S.Ct. 2646,

57 L.Ed.2d 631 (1978). The effects of the road improvements on Plaza East, if viewed separately from the taking of the 0.154-acre strip, plainly do not meet the *Lingle* test. Presumably for this reason Kimco presents its case in terms of Indiana case law. Because recent constitutional takings cases to some extent have modified Indiana case law, a discussion of these constitutional cases is useful background."

Argument Rebutting Respondent

I. Violation of Kimco's rights under Fifth and Fourteenth Amendments first occurred when Indiana Court issued its decision. Previously, Kimco had the jury verdict; the trial judge denied State's motion to set it aside; unanimous affirmance by Indiana Court of Appeals.

After Indiana Supreme Court's reversal based on theory contradicting federal court decisions requiring severance damages, Kimco petitioned Indiana Court to re-argue and at that time – it's earliest opportunity – responded to the federal issue, referring to Fifth Amendment. Kimco's Petition For Rehearing stated:

"This Court should rehear this case because:

A. Its decision failed to follow Federal and State eminent domain jurisdiction by

incorrectly applying a regulatory taking analysis under *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), and *Biddle v. BAA Indianapolis, LLC*, 860 N.E.2d 570 (Ind. 2007), to a physical taking. Because the State initiated condemnation, a regulatory analysis is improper. Kimco's damages are a direct consequence of the taking of its property rights under the Takings Clause of the Fifth Amendment of the United States Constitution....

B. This Opinion [by Indiana Court] makes sweeping pronouncement that, as long as existing access points remain intact (which was not the case here) "as a matter of law...(there) is not a deprivation of a property right." (Opinion at 12). This holding further conflicts with this Court's opinion in *State v. Marion Circuit Court*, 153 N.E.2d 327 (Ind. 1958), where this Court said:

> [If] rights of access are property or property rights which the state may acquire by condemnation as specified in the Limited Access Statute, it is difficult to see how the acquisition of such rights of access could not constitute a taking of property but only a nebulous or intangible consequential injury giving rise to no claim for damages,

as contended by petitioner."

* * *

The Rehearing Petition continues:

"A. The Opinion Improperly Applies A Regulatory Taking Analysis To An Actual Taking

The State of Indiana filed its Complaint for Appropriation of Real Estate to acquire a portion of Kimco's Plaza East shopping center for a highway improvement project and specifically included in the taking "access rights to [Kimco's] real estate...TOGETHER with the permanent extinguishment of all rights and easements of ingress and egress to, from, and across the limited access facility... to Lloyd Expressway and Green River Road..." (App. P. 23-25). This is not an inverse condemnation case. Nor does it involve a regulatory taking. The State physically took a portion of Kimco's land in fee simple absolute by condemnation... and specifically and permanently condemned a significant portion of Kimco's access right. If, as the Opinion concludes, this was a regulatory taking, no condemnation action would have been filed; the taking would occur by government fiat or the landowners would have been forced to bring an action for inverse condemnation.

The Opinion recognizes that the State's condemnation of Kimco's property is a constitutional taking under the Fifth Amendment of the Constitution ... but then goes on to analyze whether certain of Kimco's damages are a "taking" under the regulatory analysis set forth in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-40 (2005) (Op. p. 6: "The effects of the road improvements on Plaza East...plainly do not meet the *Lingle* test"). This regulatory analysis is contrary to the United States Supreme Court's jurisprudence.

The plain language of the Fifth Amendment requires payment whenever the government acquires property as a result of a condemnation action. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002). The United States Supreme Court has made it clear that the State has a "categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes the entire parcel or merely a part thereof." *Tahoe-Sierra Preservation Council*, 535 U.S. at 322, citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951). On the other hand, regulatory takings involve complex factual assessments of the purposes and economic effects of the government actions. *Yee v. Escondido*, 503 U.S. 519, 523 (1992).

Given this fundamental distinction, the United States Supreme Court has held that it is inappropriate to use cases involving regulatory takings as controlling precedent for cases involving physical takings. *Tahoe-Sierra Preservation Council*, 535 U.S. at 323-324. See also *Norman v. U.S.*, 63 Fed. Cl. 231, 252 (Fed. Cl. 2004) ("Having determined that there has been no physical taking...the court must now analyze whether a regulatory taking...occurred"); *Kemp v. U.S.*, 65 Fed. Cl. 818, 822 (Fed. Cl. 2005) (Plaintiff's claim "falls into the category of physical takings...therefore...rendering a regulatory takings analysis inapplicable").

The Opinion ignores the difference between regulatory takings and physical takings and applies *Biddle v. BAA Indianapolis LLC*, 860 N.E. 2d 570, 577 ((Ind. 2007), which harmonized Indiana law with the prevailing standards of *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). In *Biddle*, this Court adopted the modern test for regulatory takings claims, holding a regulation effects a taking "if it deprives an owner of all or substantially all economic or producti8ve use of his or her property." 860 N.E. 2d at 577. By applying a regulatory analysis to the physical appropriation of Kimco's property, not only is the Court' decision contrary to federal law, but also it bars Kimco (and any similarly situated future property owner) from submitting

evidence of the consequential damages it suffered from the State's physical taking.

More importantly, the United States Supreme Court has stated that "when the government initiates condemnation proceedings, it concedes the landowner's right to receive just compensation and seeks a mere determination of the amount of compensation due." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 691 (1999) (emphasis added). "Liability simply is not an issue. Id. The filing of the condemnation action is an admission by the State that just compensation is owed for the rights condemned.

The Complaint here is clear and unambiguous. The State acquired "fee simple title... and access rights" to the shopping center's entire footage on Green River Road and also acquired the right to completely shut down both entrances (which it did) for 4-1/2 years. This Court should not, under the guise of a regulatory analysis, protect the State from the damages caused by its choices and its actions."

Indiana Court, drawing upon United States Constitution and United States Supreme Court cases as authority, was aware of the constitutional issue. *It created the issue*, and had opportunity to deal with it in the Rehearing. Instead, it denied Rehearing.

Additionally, no existing state, judicial decision or event which could be violation of federal rights existed before Indiana Court decision. In Respondent's cited cases, there was an existing occurrence. In *Street*, it was arrest for disorderly conduct. In *Webb*, court decree. In *Exxon*, Alabama's passage of oil and gas tax. In *Rotary Intl.*, gender discrimination by termination of Rotary Club's membership in the International organization which precluded women members. In *Adams*, a lower court decision.

The issue is Kimco's right to severance damages not State's right to appropriate property.

When the issue first arose (by Indiana Court decision), Petitioner rebutted it in the only manner available: Petition to reargue, explicitly citing federal cases. In less compelling circumstances, Supreme Court allowed such procedure (*Hathorn v. Lovarn*, U.S. 255 (1982); New York ex.Rel. *Bryant v. Zimmerman*, 278 U.S. 63 (1928); *Meyer v. Richmond*, 172 U.S. 82 (1898).)

Indiana Court having full opportunity to address the issue denied Rehearing. By Indiana Court's silence, Petitioner cannot in fairness be penalized by this Court. Requiring Petitioner to raise Fifth Amendment issue earlier than Indiana Court's decision would be draconian.

The facts of this case, recited in two Indiana

State Court opinions and in this Petition proceeding provide a record on which to base a decision to grant Petitioner's Writ; sufficient also for the full Court afterwards to render decision.

Respondent's argument of not raising federal issue is not persuasive.

II. Respondent asserts Kimco argues that State by condemning a "nearby" strip of land and built a median changing the traffic pattern in front of the property effectuated taking of the shopping center's property insofar as it caused that property to lose value, adding median was built "exclusively" on State's "pre-owned property – not on Kimco property that the State condemned." (Median extended the length of Plaza East ending at Northern Entrance.)

State ignores use of condemned land as indispensible to the project for creating the acceleration/merge lane and painting solid white line discouraging potential shoppers from moving into the acceleration/merge lane to enter Southern Entrance; also producing dangerous four-way intersection at Northern Entrance and preventing its expansion.

Without Kimco's land, State could not accomplish its goals. Forcing Northern Entrance into four-way intersection and painting white line are proximate causes of Kimco 's impairment of access, not, the median.

Plaza East is not "surrounding property"; not "others" property. *Campbell* case and *United States v. 50 Acres of Land* case and *Loretto* and *W. Va. Pulp & Paper Co.* cited on page 11 by State are inapposite. The law inapplicable, their facts do not compare to this case.

Curry v. Waverly & N.Y. Bay R. Co., Respondent's Brief page 13, involves partial condemnation case. Court stated, as to partial condemnation, 52 N.J.L. 381, 391, 20 A. 56, 57: "Within the tract thus owned his rights are twofold – First, he is to be paid the value of the land included in the petition of the condemning agent; and, secondly, he is entitled to an award of such damages as result to the residue of his tract."

Sharp v. United States, 191 U.S. 346 (1903) is only partially applicable. The claim was also for damage to land on an adjoining separate parcel. Compensation was denied for that. As to partial condemnation aspect, the Syllabus states: "Where the government condemns part of a parcel of land, the damage to the *remainder of the parcel* arising from the probable use which the government will make of the part taken is the proper subject of award."

Indiana Court presents issues affecting the real estate industry. Unless overruled, it perpetrates violation of Petitioner's right for severance damages caused by impairment of access

reducing market value of remaining Plaza East.

The importance is signified by amicus brief of International Council of Shopping Centers ("ICSC") and National Association of Real Estate Investments Trusts ("NAREIT").

Before Indiana Court, amicus brief was filed by Indiana Association of Cities and Towns and The Indiana Municipal Lawyers Association.

Many eyes look to this Supreme Court to pronounce the constitutional standard under the Fifth Amendment applicable to the States.

ICSC's members are retail related. NAREIT's members engage in retail, offices, industrial and lodging.

ICSC holds law conference for lawyer members. Lectures, Seminars and informative programs discuss legal subjects. Cases such as this have great interest to their attorneys.

Intense interest in the historical importance of this Writ is shown. Historical because Indiana Court's decision, besides flawed overrides United States Supreme Court decisions.

If a lender desires making a loan in any state, risking millions, and the property may be threatened by a partial condemnation, will its borrower be protected by Fifth Amendment? That is a dilemma

until this United States Supreme Court speaks.

Ability to safely and suitably enter or leave is not traffic flow. Access is recognized as a property right in Indiana. *State v. Lovett*, 254 Ind. 27, 257 N.E.2d 298 (1970); *Jenkins v. Bd. of County Comm'rs of Madison County*, 698 N.E. 3d 1268 (1998). Typical is *City of Houston v. Precast Structures, Inc.*, 60 S.W. 3rd 331 (2001). Access is so vital Texas places it in a special category and awards damages for impairment even where no part of owner's land is taken.

Kimco's property is taken along the road integrated in the project making it the acceleration/merge lane. That lane affects only Plaza East's Southern Entrance. To discourage vehicles from moving into the acceleration lane State painted white line.

State might claim to benefit retailers by enlarging trade area, as potential customers drive from longer distances. State could have proved benefits as an offset to Kimco's award. State did not introduce such evidence.

Hypothetically if Plaza East were benefited, customers from the more distant trade area arriving would find inability to get in or out. That harm is special and peculiar to Plaza East. And State prohibited changing the access to deal with the harm.

North of Plaza East is a regional mall and other competing centers, within walking distance. None are affected adversely by the condemnation project. Plaza East's injury is not shared by the community. Those retailers may benefit, but Kimco, denied severence damages, foots the bill if Indiana Court decision prevails.

This violates Fifth Amendment. In *Armstrong v. United States*, 364 U.S. 40 (1960), the Court stated,

> "This Court has recognized that the Fifth Amendment's guarantee is to bar government from forcing some people alone to bear public burdens which, in all justice and fairness, should be borne by the public as a whole."

Northern Entrance, became non-functionable because State, desirous of avoiding damage award, constructed an unworkable plan. A functioning two lane access point was turned into a Frankenstein four-way intersection without a traffic light, using same two-lane Northern Entrance prior existing for right out only. Indiana Court cites leaving Northern Entrance being physically in the same as before as example that nothing changed by condemnation. Indiana Court cites *Lingle* as authority for turning this into inverse condemnation case.

Respondent page 5 quotes Indiana Court that "neither the construction of the median alone, nor

the hypothetical conversion of Green River Road to a one-way street would have constituted a compensable taking by the State; implying Kimco cannot be compensated. State did not construct median alone; it did, much more; facts of "much more" are ignored by Indiana Court. More significantly, if the Road were made one-way street, all properties on that street – the public – would share the effect. In this case, only Kimco was the victim.

CONCLUSION

The Writ prayed for by Kimco's Petition should be granted.

DATED: December 15, 2009

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AND
VANDERBURGH COUNTY, INDIANA,

Petitioners,

V.

STATE OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari to the
Indiana Supreme Court

BRIEF *AMICUS CURIAE* OF THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS AND NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS IN SUPPORT OF PETITIONERS

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November 5, 2009

STATEMENT OF INTEREST AND CONSENT OF PARTIES

The International Council of Shopping Centers ("ICSC") is the global trade association of the shopping center industry. Its 60,000 members in the U.S., Canada and more than 80 other countries include shopping center owners, developers, managers, marketing specialists, investors, lenders, retailers and other professionals as well as academics and public officials. The ICSC was founded in 1957.

The National Association of Real Estate Investment Trusts ("NAREIT") is the worldwide representative voice for real estate investment trusts ("REITs") and publicly traded real estate companies with an interest in United States real estate and capital markets. NAREIT's members are REITs and other businesses throughout the world that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.

The issues raised in the instant action are of significant importance to the members of ICSC and NAREIT. As set forth below, the law has developed in states such as Indiana that deny property owners true "just compensation" as guaranteed by the Fifth Amendment of the United States Constitution. Specifically, these states prohibit including in the compensation paid to condemnees, the diminution of value of condemned property caused by changes in access to the condemned property. These damages are widespread due to the number of highway improvement projects throughout the country. This

issue is critical to the members of ICSC and NAREIT because they are regularly subjected to these condemnations and are denied true just compensation.

The parties to this action have consented to the filing of this amicus brief.

QUESTIONS PRESENTED

Whether, in a de jure partial taking, the just compensation paid to a condemnee may include the diminution in value of the remainder – i.e., the part of the property not taken – caused by a change in access.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which provides, in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution, which provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Other Authorities

McKirdy, *Compensation for Impairment of Rights of Access*, 1988 Institute on Planning, Zoning and Eminent Domain § 13.03 (Sw. Legal Found) 4, 17

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William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694 (1985) 4

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REASONS FOR GRANTING THE PETITION/ SUMMARY OF ARGUMENT

Few issues have received as much attention by the courts and by the public as those relating to the government's use of its power of eminent domain. Indeed, recognizing the importance of these issues, this Court has decided at least four eminent domain cases since 2005 and is considering at least one case on its current docket.

However, the specific issue of this case has never been addressed by this Court. Perhaps the largest category of condemnations occurs as part of highway improvement and other roadway projects. These condemnations often change or eliminate an access point that is a valuable element of the condemned property. Partial takings[1] that impair access to condemned property occur regularly.

These takings can significantly impact the value of the "remainder" – i.e., the property that is not taken – and, just like other elements of value, should be considered when determining the amount of just compensation owed to the condemnee. For example, the Appraisal Institute specifically directs its appraisers to consider a property's access and potential changes in access when conducting an appraisal.

However, most states do not generally compensate condemnees for the decrease in value attributable to changes in access ("Access Compensation"). For example, most states will not permit just compensation to include Access Compensation – even if there has been a diminution

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[1] Condemnations that only take part of the condemnee's property are known as "partial takings."

of value – if the remainder has "reasonable access." In the instant case, the Supreme Court of Indiana stated that the jury award was "sustainable only if [the Condemnee's] impaired access is compensable." *See* Pet. A-10. That Court held that, even though the condemnee demonstrated – and the jury found – that the change in the access decreased the value of the remainder, it was not compensable. As set forth below, these rulings deny condemnees true "just compensation."

The exclusion of elements of value such as Access Compensation violates the Fifth Amendment's "just compensation" mandate. The Fifth Amendment to the Constitution of the United States requires that condemnees must be paid "just compensation" for the taking of their property. The Just Compensation Clause requires, at a minimum, that a condemnee "must be made whole" and must "be put in as good a position pecuniarily as if his property had not been taken." *Olson v. United States*, 292 U.S. 246, 255 (1934). The compensation "must be a full and perfect equivalent for the property taken" and must include "all elements of value that inhere in the property . . . ." *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893), *Olson*, 292 U.S. at 256. In calculating the amount of just compensation, a condemnee is entitled to the fair market value of its property at the time of the taking which is "to be ascertained from 'what a willing buyer would pay in cash to a willing seller.'" *Almota Farmers Elevator & Warehouse Co. v. U. S.*, 409 U.S. 470, 473-474 (1973). In partial takings cases, the just compensation must include the damage to the

"remainder." *United States v. Grizzard*, 219 U.S. 180, 184 (1911).

Each of these requirements is violated if the compensation paid to a condemnee does not include damages to the remainder caused by a change of access. Once it is established in a de jure condemnation action – as was the case in the instant action – that a change of access caused a decrease in value to the remainder, the condemnee necessarily will not be "made whole" or "be put in as good a position pecuniarily as if his property had not been taken" unless it is compensated for that decrease. Compensation that does not reflect this decrease necessarily will not "be a full and perfect equivalent for the property taken."

In addition, it is beyond debate that access can be an "element of value" of many properties. Accordingly, in such cases, condemnees must be paid for the decrease in that "element of value." *Olson*, 292 U.S. at 256. It is also beyond debate that "a willing buyer and seller" would consider a property's access in determining the sale price. Accordingly, any decrease in value to the remainder caused by a change in access must be included in the just compensation payment. *Almota Farmers Elevator & Warehouse Co.*, 409 U.S. at 473-474, *Grizzard*, 219 U.S. at 184.

This Court has not addressed this specific issue which impacts property owners every day. Commentators discussing this issue agree that it has created confusion and often leads to the denial of just compensation. As one commentator explained in analyzing this specific issue, "Even within the same jurisdiction, there may be inconsistencies and gray areas. From state to state, inconsistency is the

norm." McKirdy, *Compensation for Impairment of Rights of Access*, 1988 Institute on Planning, Zoning and Eminent Domain § 13.03 (Sw. Legal Found.).

Therefore, it is critical that this Court provide guidance regarding this issue. Accordingly, for the reasons set forth below, ICSC and NAREIT respectfully submit that the Petition should be granted.

ARGUMENT

I. "Just Compensation" Must Include Diminutions In Value Caused by A Change In Access

A. The Just Compensation Clause Provides A Critical Protection of Property Rights

The Fifth Amendment to the United States Constitution mandates that condemnees must be paid "just compensation" for the taking of their property. The requirement that a condemnee be paid just compensation is a critical prerequisite to the use of the extraordinary power of eminent domain. James Madison, the author of the Fifth Amendment's Just Compensation Clause, created "strong safeguards for rights in general and for property rights in particular." William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 694 (1985). These "strong safeguards" include the Just Compensation Clause. *Id.* In *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), this Court

opined, "In any society the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government." *Id.* at 326. In analyzing the Just Compensation clause, this Court explained:

> The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being, "Nor shall private property be taken for public use without just compensation." The noun "compensation," standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective "just" had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective "just." There can, in view of the combination of those two words, be no doubt that

> the compensation must be a full and perfect equivalent for the property taken.

Id. at 326 (emphasis added).

Accordingly, any compensation that does not provide a "full and perfect equivalent for the property taken" violates the Just Compensation Clause and the safeguards of the Fifth Amendment.

B. A Condemnee "Must Be Made Whole" And "The Compensation Must Be A Full And Perfect Equivalent For The Property Taken"

This Court addressed the just compensation requirement in *Olson v. United States*, 292 U.S. 246 (1934) and held that in order to satisfy this Constitutional guarantee, a condemnee "must be made whole." *Id.* at 255. The Just Compensation Clause guarantees a condemnee will "be put in as good a position pecuniarily as if his property had not been taken." *Id. See also U.S. v. 564.54 Acres of Land, More or Less, Situated in Monroe and Pike Counties, Pa.*, 441 U.S. 506, 510-511 (1979) ("[i]n giving content to the just compensation requirement of the Fifth Amendment, this Court has sought to put the owner of condemned property in as good a position pecuniarily as if his property had not been taken.") (quoting *Olson* 292 U.S. at 255). "'Compensation,' as used in the constitutional provision as a limitation upon the power of eminent domain, implies full indemnity to the owner, that is, equivalent (usually monetary) for the loss sustained

by the owner for the land which has been taken or damaged." 4-12 Nichols on Eminent Domain § 12.01.

In *Monongahela Navigation Co.*, this Court held, "There can, in view of the combination of those two words [just compensation], be no doubt that the compensation must be a full and perfect equivalent for the property taken." 148 U.S. at 326. Indeed, "[t]he word 'just' is used evidently to intensify the meaning of the word 'compensation,' to convey the idea that the equivalent to be rendered for property taken shall be real, substantial, full, and ample, and that no legislature can diminish by one jot the rotund expression of the constitution." 4-12 Nichols on Eminent Domain § 12.01 (citations and quotations omitted).

This Court has also held that "[t]he guiding principle of just compensation is reimbursement to the owner for the property interest taken. . . . In many cases this principle can readily be served by the ascertainment of fair market value – 'what a willing buyer would pay in cash to a willing seller.'" *U. S. v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961) (citations omitted).

In *Almota Farmers Elevator & Warehouse Co. v. U. S.*, 409 U.S. 470 (1973) this Court summarized the practical application of these concepts as follows:

> The Fifth Amendment provides that private property shall not be taken for public use without "just compensation." And "just compensation" means the full monetary equivalent of the property taken. The owner is to be put in the

> same position monetarily as he would have occupied if his property had not been taken. To determine such monetary equivalence, the Court early established the concept of "market value": the owner is entitled to the fair market value of his property at the time of the taking. And this value is normally to be ascertained from "what a willing buyer would pay in cash to a willing seller."

Id. at 473-474 (citations omitted). *See also* 3-8 Nichols on Eminent Domain § 8.02 (The Supreme Court of the United States "has stated that the term 'just compensation' refers to the fair and reasonable market value of land or interest therein that is taken by the government, as measured at the time of the taking.")

C. Just Compensation Must Include "All Elements Of Value"

In determining the amount owed to a condemnee, "[j]ust compensation includes all elements of value that inhere in the property . . . ." *Olson*, 292 U.S. at 256 (1934). As one commentator has explained:

> All elements of value inherent in the property merit consideration in the valuation process. Every element which affects value and which would influence a prudent purchaser should be considered. No single element,

> standing alone, is decisive and, of course, illegal considerations should be ignored. No general rule can be inflexibly adhered to. Each case necessarily differs from all others insofar as its factual situation is concerned, and exceptional circumstances render imperative a fair degree of elasticity in application of the fundamental rule.

4-12 Nichols on Eminent Domain § 12.01 (footnotes omitted).

Similarly, in *Jacobs v. United States*, 290 U.S. 13 (1933), this Court held, the amount guaranteed to a condemnee is "just compensation, not inadequate compensation. The concept of just compensation is comprehensive and includes all elements . . . ." Id., at 17-18.

D. Just Compensation In Partial Takings Cases Must Include The Damage To The "Remainder"

The instant issue – whether just compensation should reflect the diminution in value due to a change in access – arises primarily in the context of "partial takings."[2] Partial takings involve the condemnation of part of a condemnee's property. In those cases, the damage to the portion of the property not taken – known as the "remainder" –

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[2] This issue not relevant in "total takings" – where the entire property is taken – because the entire property, including the use of access, is valued.

must be considered in determining just compensation.

This concept was explained in *United States v. Grizzard*, 219 U.S. 180 (1911) as follows:

> Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted.

Id. at 184.

The holding in *Grizzard* was based upon, *inter alia*, *Bauman v. Ross*, 167 U.S. 548 (1897), where this Court held:

> Consequently, when part only of a parcel of land is taken for a highway, the value of that part is not the sole measure of compensation or damages to be paid to the owner; but the incidental injury or benefit to the part not taken is also to be considered. When the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account.

Id. at 574.

Similarly, in *U.S. v. Miller*, 317 U.S. 369 (1943), this Court explained:

> If only a portion of a single tract is taken the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the entire tract. Such damage is often, though somewhat loosely, spoken of as severance damage.

Id. at 376.

Therefore, in partial taking cases, the damage to the remainder must be considered in determining just compensation.

E. Diminution In Value Due To A Change In Access Must Be Included In Just Compensation Payments

As shown above, the Just Compensation Clause requires, at a minimum, that a condemnee "must be made whole" and must "be put in as good a position pecuniarily as if his property had not been taken." *Olson*, 292 U.S. at 255. The compensation "must be a full and perfect equivalent for the property taken" and must include "all elements of value that inhere in the property . . . ." *Monongahela Navigation Co.*, 148 U.S. at 326, *Olson*, 292 U.S. at 256. In calculating the amount of just compensation, a condemnee is entitled to the fair

market value of its property at the time of the taking which is "to be ascertained from 'what a willing buyer would pay in cash to a willing seller.'" *Almota Farmers Elevator & Warehouse Co.*, 409 U.S. at 473-474. In partial takings cases, the compensation must include the damage to the "remainder." *Grizzard*, 219 U.S. at 184.

Each of these requirements is violated if the just compensation does not include damages to the remainder caused by a change of access. Once it is established in a de jure condemnation action – as was the case in the instant action – that a change of access caused a decrease in value to the remainder, the condemnee necessarily will not be "made whole" or "be put in as good a position pecuniarily as if his property had not been taken" unless it is compensated for that decrease. Compensation that does not reflect this decrease will not "be a full and perfect equivalent for the property taken."

In addition, it is beyond debate that access can be an "element of value" in many properties. The Appraisal Institute – the leading appraiser organization – instructs appraisers:

> An appraiser describes and analyzes all forms of access to and from the property and the neighborhood. . . . Planned changes in access should be verified with the appropriate authorities and considered in the appraisal.

The Appraisal of Real Estate (12th Ed.) at 207 (emphasis added). Accordingly, in cases where a change of access decreases the value of the

remainder, the condemnee must be paid for the decrease in that "element of value." *See Olson*, 292 U.S. at 256.

It is also beyond debate that "a willing buyer and seller" would consider the properties' access in determining the sale price. Accordingly, any decrease in value to the remainder caused by a change in access must be included in the just compensation payment. *See Almota Farmers Elevator & Warehouse Co.*, 409 U.S. at 473-474; *see also Grizzard*, 219 U.S. at 184.

Notwithstanding, the fundamental principles pronounced by this Court summarized above, most states violate the Just Compensation Clause because they restrict the ability of condemnees to obtain Access Compensation. *See*, e.g., *0.958 Acres, More or Les v. State of Alaska*, 762 P.2d 96 (Alaska 1988); *Brumer v. Los Angeles County Metro Trans. Auth.*, 36 Cal. App. 4th 1738 (Cal. Ct. App. 1995); *Dept. of Trans. v. Marilyn Hickey Ministries*, 159 P.3d 111 (Colo. 2007); *Palm Beach Cty. v. Tessler*, 538 So. 2d 846 (Fl. 1989); *Circle K General, Inc. v. Dept. of Trans.*, 396 S.E.2d 522 (Ga. Ct. App. 1990); *Merritt v. State of Idaho*, 742 P.2d 397 (Idaho 1986); *Leblanc v. State of Louisiana*, 626 So. 2d 1151 (La. 1993); *Osborne v. The City of Manhattan, Kansas*, 765 P.2d 1100 (Kan. 1988); *Com. v. Comer*, 824 S.W.2d 881 (Ky. Ct. App. 1991); *Malone v. Com.*, 389 N.E.2d 975 (Mass. 1979); *City of Gulfport v. Anderson*, 554 So. 2d 873 (Miss. 1989); *Orcutt v. Town of Richmond*, 517 A.2d 1160 (N.H. 1986); *Dale Properties, LLC v. State*, 638 N.W.2d 763 (Minn. 2002); *State v. Linnecke*, 468 P.2d 8 (Nev. 1970); *State v. Shanahan*, 389 A.2d 937 (N.H. 1978); *State v. National Amusements, Inc.*, 581 A.2d 1353 (N.J.

Super. Ct. App. Div. 1990); *Dept. of Trans. v. Harkey*, 301 S.E.2d 64 (N.C. 1983); *Com. v. Guyette*, 520 A.2d 548 (Pa. Commw. Ct. 1987); *Bruzzese v. Wood*, 674 A.2d 390 (R.I. 1996); *City of Grapevine v. Grapevine Pool Road Joint Venture*, 804 S.W.2d 675 (Tex. App. 1991); *Union Elevator & Warehouse Co., Inc. v. State*, 980 P.2d 779 (Wash. Ct. App. 1999).

In the instant case, the Supreme Court of Indiana stated that the jury award was "sustainable only if [the Condemnee's] impaired access is compensable." *See* Pet. A-10. As shown above, an application of this Court's holdings leads to the inevitable conclusion that there is no question that it should have been compensable. The condemnee demonstrated – and the jury found – that the change in the access decreased the value of the remainder. Therefore, unless the condemnee was permitted to obtain compensation reflecting that decrease, it would not "be made whole," "be put in as good a position pecuniarily as if his property had not been taken" or receive the "full and perfect equivalent for the property taken." The decrease in value due to the change in access was clearly an "element of value that inhere[d] in the property . . ." and unless it was compensable, the compensation amount did not include the amount "a willing buyer would pay in cash to a willing seller." *See Olson*, 292 U.S. at 255, 256, *Monongahela Navigation Co.*, 148 U.S. at 326, *Almota Farmers Elevator & Warehouse Co.*, 409 U.S. at 473-474, *Grizzard*, 219 U.S. at 184.

The results caused by states that do not permit Access Compensation are unjust and clearly contrary to the intent of the Just Compensation Clause and this Court's holdings. First, there should

be no restrictions on the ability of a condemnee to obtain Access Damages if they are proven.

Further, these improper rules have led to disparate results. Commentators agree that these rulings have created serious problems:

> It must be understood that because courts from different jurisdictions agree in general terms on a reasonableness test for compensable impairment of access, it does not necessarily follow that they will reach the same result under similar factual circumstances. The nature of the access right is subject to different interpretations in different jurisdictions, and naturally this will affect the question of the right of the abutting landowner to recover damages for limitation of access resulting from the conversion of a conventional highway into a limited-access highway. For example, in *People v Ricciardi* (1943) 23 Cal 2d 390, 144 P2d 799, infra, the court said that abutting landowners possessed "the right of direct access to the through traffic highway," while at the other extreme, the court in *State ex rel. State Highway Com. v Danfelser* (1963) 72 NM 361, 384 P2d 241, cert den 375 US 969, 11 L Ed 416, 84 S Ct 487, infra, rejected the view that the abutting landowner has anything more than a right of reasonable access

> to the general highway system. Yet in both of these cases the courts recognized the right to recover for substantial or unreasonable limitation of access. And in *Stefan Auto Body v State Highway Com.* (1963) 21 Wis 2d 363, 124 NW2d 319, infra, which also recognized a reasonableness test for compensable impairment of access, the court applied a more stringent definition of the right of access to federal interstate highways than it said was applicable to other limited-access highways.

42 A.L.R.3d 13.

One commentator explained:

> Virtually all jurisdictions state the rule that if governmental activity creates a "material and substantial impairment" of access, then compensation may be awarded. The owner is said to be entitled to "reasonable" or "free and convenient" or "suitable" access. Nevertheless, courts differ on what they consider "reasonable," and their consideration is essentially fact-based.

8A-G16 Nichols on Eminent Domain § G16.03.

Another commentator states:

> Virtually all jurisdiction state the rule that if governmental activity creates a "material and substantial impairment" of access, compensation will be allowed. The property owner is said to be entitled to "reasonable" and "free and convenient" or "suitable" access. Unfortunately, the apparent unanimity on this score does not provide a meaningful guidepost to the issue of compensability: Different courts take different views of what is reasonable or suitable or the like.
>
> The reasonableness test, however, while ostensibly close to being a true analytical tool, is not. It permits the court, if so inclined, to balance the degrees of harm that we will not expect individuals to suffer for the benefit of the general public. It therefore performs one valid function: It allows courts ad hoc to do rough justice. It fails, however, to permit enough predictability of result to qualify as a true basis of analysis. Even within the same jurisdiction, there may be inconsistencies and gray areas. From state to state, inconsistency is the norm.

McKirdy, *Compensation for Impairment of Rights of Access, 1988 Institute on Planning, Zoning and Eminent Domain* § 13.03 (Sw. Legal Found.) (emphasis added).

To the extent this Court has considered similar issues, it has held that just compensation must include Access Compensation. For example, in *U.S. v. Welch*, 217 U.S. 333 (1910) this Court held that where access was taken by the Federal Government, the damage to the remainder for that change must be included in the just compensation award. *Id.*

Similarly, in *Grizzard*, this Court held that the taking of an "easement of access" was a compensable element of just compensation. In that case, the United States government flooded a farm. The owners of the farm owned an "easement of access" over a public road running across the flooded land which was also destroyed by the same flood. That public road was the access point for the farm. The United States argued that the loss of that easement should not have been considered in determining the amount of just compensation owed to the condemnee. As the Court explained, "[b]oth the petition and the finding show that access to the public road has been cut off by the intervention of flooded land actually taken." *Id.* at 185. The Court held that the impact of the loss of such access must be considered in determining the proper amount of just compensation.

It is clear that this Court must provide direction regarding this recurring problem. Courts are not paying true just compensation and, at best, "[f]rom state to state, inconsistency is the norm." This is causing great harm to property owners and must be rectified.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

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